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MINING CLAIMS * 1 Generally

The 150-day statutory period in which to file a verified statement under the act of July 23, 1955, is the maximum time allowable for such purpose and such purpose and it may not be extended.

Estate of Martin H. Anderson, Sacramento 060098-Q(1-2) PL 167

(January 31, 1961)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Sacramento 060098-Q
(1-2) PL 167
5.04g

January 31, 1961

Certified Mail
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DECISION

Estate of Martin H. Anderson, : Verified Statement
Harold V. Sauers : Act of July 23, 1955

Decision Affirmed

Mr. Sauers has appealed from a decision of July 18, 1960, rejecting a verified statement filed in purported compliance with section 5 of the act of July 23, 1955 (30 U.S.C. 613). The decision recited that the statement was filed on May 13, 1960 after the 150-day period wherein it was required to be filed, the first publication having been made on December 2, 1959 and the 150-day period having expired on May 2, 1960.

On appeal Mr. Sauers states--"I do not know why the documents and notices were sent to me, as I was only working the claims." He stated that he was working the claims listed in the statement but that ownership is in the estate of Mr. Anderson in which estate he appears to have no official interest. However, Mrs. Katherine D. Sauers, of the same address as the appellant, is shown as a party entitled to share in the estate of Estate of Martin H. Anderson. His appearance in this matter is recognized in her behalf.

It appears to have been the appellant's belief that unless he filed a verified statement that any rights in the mining claim which he was then actively working would be forfeited and the claim held for nought and invalid. This is not the case. A proceeding under the act does not affect the possessory rights of a mining claimant; it is merely a proceeding wherein the government's right to manage the surface resources and the right of access to adjacent federal lands may be ascertained and determined. Where a verified statement is not timely filed the mining claimant is deemed conclusively to have waived his rights to management of the surface resources; and that waiver does not in any way effect the mining claimant's rights to remain upon the claim for mining purposes nor does it affect the validity of the claim. Of course, if a right to patent is established and a patent is issued, the provisions of the act become inoperative as to the land covered by the claim and the patentee gains the exclusive right to complete and quiet possession of the mining claim including both the surface and subsurface resources.

In the instant case the verified statement was not timely filed. And there is no authority whereby the time in which to file may be extended. Hines Gilbert Mines Company, 65 I.D. 481 (1958). It follows that the verified statement was properly rejected because it was not timely filed within the 150-day period prescribed by law.

The decision appealed from is affirmed.

Mr. Sauers is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5 for each mining claims included in the appeal. If the appeal covers all claims adversely affected by this decision the total filing fee is $10.00. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. Harold Sauers (Certified Mail)
Regional Forester, U.S.D.A.
Minerals Staff Officer (5)
Appeals List No. 1
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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Sacramento ML 264 (29.2)
5.04g

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DECISION

March 10, 1961

Charles K. Smith :
Lone Wolf Quartz Mining Claim
located in secs. 28 and 29, T. 21 N.,
R. 12 E., M.D.M., California

Decision Affirmed

Mr. Smith has appealed from a decision of September 7, 1960 declaring null and void that portion of the Lone Wolf Quartz Mining Claim which covers lands in proposed withdrawal Sacramento 050595. The decision recited that the proposed withdrawal, application for which was made by the Forest Service on May 31, 1955, segregates the land from mining location and a claim, insofar as it may be located on such lands, is null and void.

The appellant has failed to point out wherein the decision of September 7, is in error. However, he states that he is "asking for a reconsideration from the U.S.F.S. on their proposed withdrawal of sect. 28 & 29 to exclude the boundary of this mining claim." Thus, it appears to be the contention of the appellant that the Bureau should refrain from holding the claim void to the extent that it covers lands within the proposed withdrawal until such time as the Forest Service may amend its application to delete the lands included within the claim.

The regulation, 43 CFR 295.11(a), provides that a notation of a proposed withdrawal upon the tract book "shall temporarily segregate such lands from settlement,location***and other forms of disposal under the public land laws, including the mining laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal". Construing this regulation the Department has held that an attempt to locate a mining claim made while the land is included in an application to withdraw the land from location or entry under the general mining laws for the use of a Federal agency is invalid since the notation of the filing of the application on the land office records segregates the land from lands available for disposal under the public land laws to the extent that the proposed withdrawal would. Mrs. Ethel H. Myers, 65 I.D. 207(1958); Marion Q. Kaiser et al., 65 I.D. 485(1958).

In the instant case location was made upon lands temporarily segregated by reason of the proposed withdrawal. The location upon such lands was void ab initio; even if the application for withdrawal was withdrawn and the segregation lifted the fact would still remain that the claim, insofar as it covers lands not subject to mining location when located, would be void and no purpose can be served by awaiting for the Forest Service to review its application for withdrawal.

Mr. Smith is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

a. H. Furr

Appeals Officer

Enclosure

DISTRIBUTION:

Mr. Charles K. Smith (Certified Mail)
AA-1
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See A-28927 1-31-63
in Pl 11-46

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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
P.L. 14-8
P.L. 11-46
(Sacramento)
5.04g
March 30, 1961
Certified Mail
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DECISION

R. D. and Edna Compton : Verified Statement, Act of July 23, 1955 (30 U.S.C. sec. 613), Involving lands in Tahoe National Forest.

Decision affirmed as modified

Mr. and Mrs. Compton have appealed from a decision dated September 13, 1960, rejecting in part their verified statement filed in response to a publication on March 14, 1957 of the Granite Mt. Determination Area, pursuant to Section 5 of the above-noted Act. The verified statement was timely filed within the period required by the Act.

The decision rejected the verified statement as to portions of four mining claims situated outside of the boundaries of the Granite Mt. Determination Area and six other mining claims located entirely outside of that area. It held the verified statement to be effective only as to one mining claim and those portions of the four mining claims lying within the Granite Mt. Determination Area. The other six mining claims listed in the statement were found to be within the Sierra Buttes A. Area which was first published on September 12, 1957. No verified statement was filed by the appellant in response to the publication of the Sierra Buttes A. Area.

Where a mining claim is located partly within and partly outside of the boundaries of a determination area, the intent of the mining claimant filing a verified statement covering such claim will be given effect and the Government, in the interest of administrative convenience will consider such mining claim as indivisible. Therefore, the appellants' verified statement is considered to be effective as to the mining claims listed therein lying wholly or partially within the Granite Mt. Determination Area.

With respect to the six mining claims listed in the verified statement as being within the Granite Mt. Determination Area, but which are in fact within the Sierra Buttes Area, the statement was properly rejected.

The decision appealed from is affirmed as herein modified.

Mr. and Mrs. Compton and the Forest Service are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken by the Comptons the amount of the filing fee will be computed on the basis of $5.00 for each mining claim included in the appeal. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal by the Comptons, the adverse party to be served is the Regional Forester, U. S. Department of Agriculture, 630 Sansome Street, San Francisco 11, California. If an appeal is taken by the Forest Service, the adverse parties to be served are the Comptons through their attorney, Mr. W. I. Follett, Central Building, Oakland 12, California,

A. H. [illegible]
Appeals Officer

Enclosure

DISTRIBUTION:

W. I. Follett, attorney for mining claimants (Certified Mail)
Mr. and Mrs. R. D. Compton (Regular Mail)
Minerals Staff Officer (5)
John Sieker, Forest Service (8)
Rawleigh Tremaine, Office of the Genrahl Counsel
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appeal to Sec
affirmed A-28850
9-18-62

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DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
Sacramento Contest No. 5567
5.04g

April 3, 1961
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DECISION

United States	:	J. B. Quartz Claim located in
v.	:	Sec. 16, T. 1 N., R. 16 E., M.D.M.,
Ben Fullingim and John Tinkle	:	California

Decision Affirmed

Mr. Fullingim has appealed from a decision of the hearing examiner, dated October 25, 1960, holding the J. B. Quartz Claim null and void for lack of discovery.

The complaint in the instant case charged, in material part, that minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery. To support such allegation the Government, by its mineral examiner, introduced testimony showing that mineralization on the claim is insignificant, that greater values may not be expected and indicating that a prudent man would not be justified in further development.

The sum total of the appellant's testimony is that the mineralization uncovered on the claim leads him to the belief that greater values will be encountered with further prospecting or exploration. TR 40.

A valid location of a mining claim can be made only if a valuable mineral deposit has been discovered within the limits of the claim. 30 U.S.C. 22,23. The requirements of the statute concerning discovery are met where minerals have been found and the evidence is of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; but hopes and beliefs, however strong they may be, that a valuable deposit exists cannot be substituted for nor be accepted as a substitute for an actual discovery. Castle v. Womble, 19 L.D. 455 (1894). The mere showing of the presence of minerals within the limits of a mining claim without a showing that there is a mineral deposit of value does not meet the requirements of the mining laws. Julius R. Gugliemetti, A-27871 (May 13, 1959).

The mere presence of minerals within the limits of the J. B. Quartz Claim without a showing that they constitute a valuable deposit and even though the appellant believes that further exploration may disclose a valuable deposit is not a discovery within the meaning of the mining law. Absent a valid discovery the mining claim is null and void.

The hearing examiner's decision is affirmed.

Mr. Fullingim is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal the adverse party to be served is:

Regional Solicitor
Department of the Interior
P. O. Box 4291 T & C
Sacramento 21, California

Appeals Officer

Enclosure

DISTRIBUTION:

Mr. Ben Fullingim (Certified Mail)
Mr. John Tinkle (Regular Mail)
Hon. Harold T. Johnson M.D., House of Representatives
Regional Solicotor
Hearing Examiner, John A. Wood
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WASHINGTON 25, D. C.

IN REPLY REFER TO:
Sacramento 057241
6.05c

JUN 28 1961

DECISION

Ernest A. Gray : Mineral Entry

Decision Vacated and Case Remanded

Mr. Gray has appealed from that portion of a decision of February 24, 1961, requiring him to furnish certain additional evidence in connection with his mineral patent application.

The mining claims involved were located in 1937. The patent application recites of a discovery of sand and gravel and appears to comply with all the requirements of the regulations. The additional data and information purported to be required by the decision appealed from is properly for investigation and ascertainment by the minerals officer. If, after investigation, valid discoveries are questioned the mining claimant may be required to substantiate his allegations in a proceeding brought for that purpose. Accordingly, the decision appealed from is vacated.

Although the patent application recites of a discovery at time of location and alleges present marketability of the material by reason of certain sales to the County, it is not clear from the context whether any sales were made prior to the enactment of the act of July 23, 1955 (30 U.S.C. 611 *et seq.*). This ambiguity should be clarified.

This decision should not be construed as a finding that discovery within the meaning of the mining law has been established.

The case record is remanded through the Bureau's State Director. All else being regular, the patent application should be processed further.

(Sgd.) John B. Piccolo
Acting Appeals Officer

DISTRIBUTION:

Gilmore & Gilmore, Attorneys at Law (Regular Mail)
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In reply refer to:

Sacramento Contest No. 5721
Mineral Patent Application 056889
6.05c

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LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 31, 1961

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DECISION

United States
v.
Carolyn G. Henrikson
Eunice E. Henrikson
Charles H. Henrikson
Oliver M. Henrikson

Bear Creek Gravel Placer Mining Claim Located in the SE¼SE¼ sec. 33, T. 16 N., R. 16 E., M.D.M., California, and within the Tahoe National Forest.

Decision Affirmed

The above-named contestees have appealed from a decision of the hearing examiner, dated May 16, 1961, declaring the Bear Creek Gravel Placer Mining Claim null and void for lack of discovery.

The instant contest was initiated upon the protest of the Forest Service against the Mineral Patent Application 056889. The complaint charged, in pertinent part, that there is no discovery within the meaning of the mining laws within the limits of the claim and that the north half and east half of the claim were withdrawn from location. The N½SE¼ SE¼ was classified for the Deer Park Recreation Area under 36 CFR 251.22 under authority of the Secretary of Agriculture on June 12, 1950, and posted on the status records. The E½SE¼SE¼ (not the E½SE¼ as charged) was included in a special use permit issued by the Forest Service in 1952 to a private individual for a ski tow. If the N½SE¼ was classified and properly noted and posted as required, then the classification of June 12, 1950, would serve as a withdrawal of the lands and bar mineral location; any location thereafter made on such land would be void ab initio. However, a special use permit does not ipso facto segregate the land from mineral location. See 43 CFR 258.10.

The mining claim herein involved was located in April 1954 for the alleged valuable deposits of sand and gravel therein contained. The

Government mineral examiners testified they had traversed the claim and had found several pits exposing the material for which the claim was located. The mineral examiners were of the opinion that the exposures of materials on the claim indicated a quantity insufficient to sustain a mining operation.

Mr. Oliver Henrikson stated that prior to and since July 23, 1955 "There is a great demand for gravel and sand and we can sell all that we can produce." TR 61. Although stating that there are no other available deposits of gravel in that area other than those developed in other places (TR 62) there have been no mining operations on the claim since the date of location and the claim, it was represented is held for its reserves. Although affirming his belief that a commercial operation could be initiated on the property he had not computed the quantity of sand and gravel and made no determination other than from surface observation concerning the amount of material on this claim. TR 69, 74. No evidence was submitted to show that the materials, if in commercial quality and quantity, could be marketed at a profit.

Professor Gianella stated he had examined only the north half of the claim. The material noted therein, he stated, is useable for aggregate. Disclaiming expertness on the economics of mining sand and gravel he was of the opinion that it would be worthwhile prospecting further to determine the extent of the deposits. TR 96, 97. However, the major deposits of sand and gravel in the area lie north of the northern boundary of the Bear Creek claim. TR 97.

To satisfy the requirements of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit can be extracted, removed and marketed at a profit. *Foster* v. *Seaton*, 271 F. 2d 836 (1959). Under section 3 of the act of July 23, 1955 (30 U.S.C. 611), deposits of common varieties of sand and gravel are not deemed to be valuable mineral deposits within the mining laws so as to give effective validity to any mining claim thereafter located under those laws and a claim located for sand and gravel prior to July 23, 1955, is valid only if it meets the requirements of the mining laws prior thereto. *U.S.* v. *Armenta et al.*, A-28248 (June 22, 1960); *U.S.* v. *Chamberlin*, A-28610 (July 17, 1961).

The mere fact that sand and gravel exists within a mining claim does not mean that the material is of commercial quantity and/or quality and can be extracted, removed and marketed at a profit. In the instant case the appellants, mineral patent applicants, failed to show the material is of commercial quantity, at best they showed that some deposits exist and that further prospecting and exploration may be justified to determine the quantity; they failed to show that each

10 acre subdivision is mineral in character and - other than expressions of hope and belief - they failed to show that even if the material exists in commercial quantity and quality that it can be marketed at a profit. The representations that other operations on other lands may be profitable is not a showing that a commercial operation on this land is justified. That this claim has been held for seven years during which period "There is a great demand for gravel and sand and we can sell all that we can produce" and during which period the appellants failed to inquire into the quantity of material available and failed to sell any materials from the claim convinces us that the appellants had located the claim in 1954 for a possible future use and neither prior to July 23, 1955, nor at any time since, able to extract, remove and market the material at a profit. "To allow such land to be removed from the public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the Congressional purpose in encouraging mineral development." Foster v. Seaton, supra.

Therefore, no discovery being demonstrated, the hearing examiner's decision declaring the Bear Creek Gravel Placer Placer Mining Claim null and void is affirmed and the patent application is rejected.

The appellants herein are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal the adverse party to be served is:

Office of the General Counsel
U. S. Dept. of Agriculture
25 Taylor Street, Rm. 624
San Francisco, California

John B. Piccolo
Acting Chief, Division of Appeals

Enclosure

DISTRIBUTION:

Oliver M. Henrikson (Certified Mail)
Charles H. Henrikson (Certified Mail)
D. R. Robinson, Attorney for Mining Claimants (Certified Mail)
Office of the General Counsel
Regional Forester, San Francisco, California
Mr. Rawleigh L. Tremain, U.S.D.A., Washington D. C. (2)
Mr. John Sieker, Forest Service, U.S.D.A., Washington D. C. (8)
SD (California)
LO (Sacramento) ✓
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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Office of Hearing Examiners
924 Boston Building
Salt Lake City 11, Utah

November 27, 1961

DECISION

UNITED STATES OF AMERICA, Contestant : CONTEST CALIFORNIA 6898, Involving the Alice Ellen Placer Mining Claim, Situated in Section 19, T. 16 S., R. 5 E., S.B.M., California, Recorded in Book 2493, page 454, Official Records of San Diego County.

v.

MELVIN L. NEVITT, Contestee

ADVERSE PROCEEDINGS DISMISSED

At the request of the United States Forest Service a complaint was filed against the above-named mining claim, alleging as follows:

(a) There is no discovery of a locatable mineral on this claim within the meaning of the mining laws;

(b) The land is nonmineral in character within the meaning of such laws;

(c) The land is not being used and occupied for mining purposes;

(d) The land is not located in conformity with legal subdivisions.

The contestee filed a timely answer denying the allegations; he also filed a motion to dismiss the complaint. This motion was denied by the chief of the mineral adjudication unit of the Bureau of Land Management's land office at Los Angeles, California, and a hearing was scheduled for May 22, 1961, at San Diego, California. At that time and place, Charles F. Lawrence, Esq., appeared on behalf of the United States Forest Service, and George W. Nilsson, Esq., appeared for the contestee. Prior to the taking of testimony, Mr. Nilsson renewed his motion to dismiss each and all of the four allegations in the complaint. The motion was denied as to allegations (a) and (b), granted as to allegation (c), and taken under advisement as to allegation (d).

From the evidence adduced at the hearing I hereby make the following:

Findings of Fact

Melvin L. Nevitt, the contestee, is the sole owner of the Alice Ellen placer mining claim which was located on October 17, 1947, on land administered by the United States Forest Service. The claim is 1500 feet in length, 600 feet in width, and is traversed in length by a drainage gulch or dry creekbed. The land upon which the claim is located is undulating and rocky with numerous granitic outcrops. The vegetation is sparse due to the lack of developed soil and the scarcity of rainfall. Since its location, considerable improvements have been constructed upon the claim by the contestee, including four stone check dams, a large earthfill storage dam, a cabin, a well, a water storage tank, a butane storage tank, a 110-volt generator, a water pump, a highline cable, and a testing mill. At least $10,000, not counting labor, has been spent upon the claim in actual preparation for mining operations.

Mr. William C. Sanborn, a graduate mining engineer employed by the United States Forest Service, first examined the claim on March 3, 1959, accompanied by the contestee and by two of the original locators, Messrs. Wiggin and Martin. Four points along the creek channel at the places indicated by Mr. Nevitt were sampled by channeling through the gravel fractions overlying the bedrock. The samples were concentrated by panning and gold values of approximately 36 cents per yard were found. On March 11, 1960, Mr. Sanborn revisited the claim in company with Mr. William L. Johnson, a mining engineer employed by the Forest Service. Three samples were taken in the same manner as before but at different points, and values obtained ranged from a low of 7 cents to a high of 13½ cents gold per cubic yard. A third visit was made by the witness on October 22, 1960, in company with William L. Johnson, Mr. Nevitt, and Mr. Myron E. Mershon, a graduate mining engineer employed by Mr. Nevitt. A new point of sampling was selected and a hole was sunk to bedrock. A channel sample was cut down the face of the pit and the assays showed a gold content of 31 cents a cubic yard. A second sample taken on this date at another point revealed one small color which could not be weighed but Mr. Sanborn estimated that it indicated the material contained gold value of 3 cents a cubic yard.

Delwin R. Curry, a practical miner and a graduate of a correspondence school in metal mining, testified that he had sampled the claim in company with Mr. Mershon in July of 1960, and had obtained samples assaying as high as $34 per ton down to a low of 75 cents per ton. These samples were taken from off the bedrock where he said the principal values could be expected. He admitted that lower mineral values would be found in the alluvium.

Myron E. Mershon confirmed the testimony of Mr. Curry as to the method of sampling done by them and the results obtained. He further said that the samples were subjected to a standard fire assay.

It was estimated by Mr. Sanborn that the Alice Ellen placer mining claim contains approximately 20,000 cubic yards of alluvium and weathered materials lying over the bedrock, having a tenor of 25 cents gold per cubic yard. Mr. Sanborn's samples were taken in a proper manner, and his estimates as to the gold content of the material sampled must be accepted as correct. However, his estimate as to the total yardage of the alluvium appears to be low. Mr. Nevitt testified that 5,000 cubic yards of this material had been used to construct the storage dam. On the basis of a comparison of the amount removed to the amount remaining, he estimated that there is at least 100,000 cubic yards of alluvium remaining on the claim. Mr. Nevitt's estimate, based on this comparison, is accepted in preference to the estimate given by Mr. Sanborn.

From the foregoing findings of fact I hereby make the following:

Conclusions of Law

First, with respect to the remaining point in contestee's motion to dismiss--allegation (d) that the claim is not located in conformity with legal subdivisions--I conclude that the motion should be and is hereby granted. The mining claim is located along the bed of a gulch or creek with the sides roughly paralleling the channel. Any mineralization is found only in the channel itself where gold upon the claim was deposited by stream action. The general rule followed by the Department, first set forth in the case of Pearsall and Freeman, 6 L.D. 277, 231 (1887) is that a placer claim must conform to the legal subdivisions only "as near as reasonably practicable," and that persons should be permitted to take a certain quantity of land fit for mining and should not be compelled to take other land irrespective of its fitness for mining. This rule was reaffirmed in the case of Snow Flake Fraction Placer, 37 L.D. 250 (1908) and in the case of William F. Carr, 53 I.D. 431 (1931). In the latter case the Department held that the mining claim did not need to conform strictly to the legal subdivisions. The auriferous gravel was on a narrow strip in the bed and on the banks of a small stream, the wall or rocky slope on either side having no mineral, agricultural, or timber value. Since the Alice Ellen placer mining location is similar to claims described in the cases cited, it is not necessary that its boundaries be in strict conformance with legal subdivisions.

It was argued by the contestee that since the engineer for the Forest Service testified that the alluvium contained values averaging 25 cents per cubic yard, that charge (b) must also be dismissed. The contestee's position is that if more than a trace or completely insignificant amounts of mineral is found that the land containing such mineralization must then be classified as mineral in character within the meaning of the mining laws. However, a review of the cases in which the term "mineral in character" has been defined reveals that the same criteria used in determining whether or not a "discovery" exists within the claim is used in determining whether or not land is mineral in character. In the case of Goldenstein v. Juneau Townsite, 23 L.D. 417 (1896), the Department, in determining whether or not land could be classified as mineral or nonmineral, adopted the rule as stated in Castle v. Womble, 19 L.D. 455 (1894), which is as follows:

> " * * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, the requirementsof the statutes have been met."

This rule, commonly called the "prudent man" rule, has been followed by the Department and has been upheld by the United States Supreme Court in the case of Chrisman v. Miller, 197 U.S. 323 (1905). It has been used in determining whether or not the mining laws with respect to the requirement of discovery have been met, and is equally applicable to the question of whether land is mineral in character. For example, in the case of Reid, et al. v. Lavellee, et al., 26 L.D. 100 (1898), the Department stated that land must be held nonmineral where no discoveries of appreciable values have been made and where it does not appear that a further expenditure would develop evidence of mineral in paying quantities. Thus, the primary question to be determined is whether or not the evidence satisfies the requirement of the "prudent man" rule. If Mr. Nevitt's avowed intent to develop the Alice Ellen placer claim is a prudent one, both charges (a) and (b) must be dismissed; if it is not, the mining location is invalid.

Based upon the results of their sampling and their estimate of the amount of available material on the claim for placer mining operations, both Mr. Sanborn and Mr. Johnson were of the opinion that further development would not be warranted on the Alice Ellen placer mining claim. On the other hand, Messrs. Mershon, Horr, Mahood, and Curry advised the contestee that the claim is worthy of further development. Although Mr. Horr and Mr. Mahood are not mining engineers, their opinions must be given weight as they are practical miners with considerable experience in mining operations. Mining men, and in particular

practical miners, are as a group notoriously optimistic about mining prospects. If they were not, much of the nation's mineral resources would remain untapped. But aside from the difference in their attitudes the divergence of conclusions reached by the Forest Service engineers as opposed to the conclusions of the miners and engineers testifying for the contestee can be partly explained by the fact that the samples were taken differently. The Government engineers took channel samples through the alluvium while the samples taken by Messrs. Mershon and Curry were taken from directly off the bedrock. The average mineralization of 25 cents gold per cubic yard of the alluvium, as compared to an average of $13.19 gold per ton in the material lying on the bedrock, follows the general rule that in gold placers (with certain exceptions) the gold, being of a higher specific gravity than the gravels, tends to gravitate to the lower depths. Thus, the evidence seems to justify Mr. Nevitt's stated intention to strip the alluvial material with a bulldozer and mine only the material close to bedrock.

On rebuttal testimony, Mr. Sanborn attacked the process by which the contestee's samples were assayed. The proper procedure, he said, would be to make a free gold determination by amalgamation, prior to the fire assay, because the sample might contain gold locked up in the individual grains of the concentrates and therefore not be amenable to amalgamation and not ordinarily recoverable by ordinary placer mining operations. If amalgamation and screening of the sample is not done prior to the assay, it was his opinion that completely erratic results might be obtained in the values shown by the assay.

In view of Mr. Sanborn's experience and training, his testimony with respect to the proper procedure in assaying a placer gold sample must be accepted. However, the record is devoid of any evidence which might indicate how much of the gold values found in the contestee's samples might or might not be recoverable by the ordinary milling process. It is entirely possible, at least insofar as I am able to determine from the evidence, that little, if any, of the gold might be locked up in the sands and, therefore, that almost 100 percent of the gold might be recoverable by gravity concentration and amalgamation.

Although the Government brought out evidence as to the amount of money spent upon the improvements upon the mining claim for the purpose of showing that such a large amount could not be recovered in any mining operation, and for the possible purpose of showing that the claim might not be held in good faith, it was brought out by the mining claimant and not refuted by the Government that all of the improvements are in preparation for and are necessary to actual mining operations. That there has been an expressed intention to perhaps stock the storage reservoir with fish does little to discredit the good faith of the mining

claimant. Contrary to the Government's position in the matter I view the amount of money spent upon the claim as an indication that the mining claimant does hold the claim in good faith.

In a contest to determine the validity of a mining claim, the contestant bears the burden of proof. Although the evidence indicates that the mining claimant is indeed taking some risk in expending further time and effort in an effort to develop the Alice Ellen placer mining claim, such a risk is inherent in nearly every mining operation. It has not been demonstrated that Mr. Nevitt would be imprudent were he to proceed further in an effort to develop a paying mine. It is not necessary that the locator of a mining claim know of a surety that he can operate a mine at a profit as long as the evidence shows, as it does here, that the risk is worth taking. I can make no conclusion that there is not a discovery of a valuable mineral on the Alice Ellen placer claim or that the land upon which the claim is located is nonmineral in character. The adverse proceedings are, therefore, dismissed.

This decision becomes final 30 days from its receipt unless an appeal to the Director, Bureau of Land Management, is filed. If an appeal is taken there must be strict compliance with the regulations in 43 CFR Part 221. (See enclosed Form 4-1364.) If an appeal is taken by contestant, the adverse party to be served is the attorney for the contestee:

Mr. George W. Nilsson
1131 Petroleum Building
714 West Olympic Boulevard
Los Angeles 15, California

John R Rampton Jr
John R. Rampton, Jr.
Hearing Examiner

Decision by certified mail to:
Mr. Charles F. Lawrence, Office of the General Counsel
Department of Agriculture, 25 Taylor Street, San Francisco, Calif.

Mr. George W. Nilsson, 1131 Petroleum Building
714 West Olympic Boulevard, Los Angeles 15, California

Copies:
Melvin L. Nevitt, 3104 Lytton, San Diego, California
Standard distribution

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In reply refer to:
6.05c
Sacramento 065700-H

UNITED STATES
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Bureau of Land Management
Washington 25, D. C.

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December 27, 1961

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DECISION

Dwyer H. Skemp : Verified Statement under the Act of July 23, 1955 (30 U.S.C. 613)

Decision Affirmed

Dwyer H. Skemp has appealed from a decision, dated September 14, 1961, which rejected his verified statements listing 6 mining claims, filed in compliance with the act of July 23, 1955 (30 U.S.C. 613), for the reason that it was not filed within 150 days from the date of first publication.

The date of first publication was February 16, 1961, the 150-day period expired on July 17, 1961, and the appellant filed his verified statements on July 27, 1961.

The appellant does not deny the late filing, but he argues that there were strong extenuating circumstances sufficient to excuse his lateness.

The statute is precise in its delineation of the period during which a verified statement must be filed and no discretion is given as to the time when the privilege of filing such statements terminates. Hines Gilbert Gold Mines Company, 65 I.D. 481 (1958). Where a claimants's verified statement was filed only one day late, the Department held that the statement was not timely filed and must be rejected. Mary E. Poast, A-27968 (July 22, 1959). Since, the appellant's verified statements were filed late, they were properly rejected.

Accordingly, the decision appealed from is affirmed.

Dwyer H. Skemp is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all applications adversely affected by this decision the total filing fee is $30.00. In taking an appeal there must be strict compliance with the regulations.

Richard J McCormick
Acting Chief, Division of Appells

Enclosure

DISTRIBUTION:

Dwyer H. Skemp (Certified Mail)
Chief, Division of Minerals
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Johnson

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6.05c
Sacramento 037277

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

January 25, 1962

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DECISION

George M. Cox, Appellant

Mineral Patent Application,
Monarch, Monarch nos. 2, 3, 4,
and 7 lode mining claims, M.S.
6323, in Sections 1, 2, 11 and
12, T. 27 S., R. 32 E., MDM,
California

Decision Affirmed

George M. Cox has appealed from the decision dated July 17, 1961, which rejected mineral patent application Sacramento 037277 because of defects which the Manager determined precluded consideration of the application in its present form.

The record before the Land Office Manager which was the basis for the Manager's decision has been reviewed and found to support his decision in that a possessory interest in the mining claims had not been established in George M. Cox.

On appeal the mineral claimant argues that by publishing a Notice of Forfeiture he established his possessory interest in the subject mining claims.

The record shows that the lands embraced by the subject mining claims were restored to mineral entry by order dated August 12, 1948 and that the appellant and his immediate family have held and worked the subject mining claims for a period greater than five years prior to the filing of the supplemental application for patent, during all of which time the claims in issue were subject to location.

The appellant may be able to establish possessory rights to the mining claims under R.S. 2332 (30 U.S.C. 38) as the claims have apparently been held and worked by the appellant for a period greater than the time prescribed by the California statute of limitations for mining claims. It appears that a decree rendered in a quiet title proceeding in an appropriate State court of competent jurisdiction would best serve the purpose of establishing the appellant's rights under R.S. 2332. If the mining claimant can establish a right in the locations under the provisions of the above-cited statute then his Notice of Forfeiture would have the effect of giving him a possessory interest in the subject mining claims. However, the fact that the land covered by the subject mining claims was restored to entry does not validate any location made while the land was not open to mineral entry. A. V. Toolson et al., 66 I.D. 48 (1959).

Accordingly, the Manager's decision is affirmed. The mining claimant may, however, file a new application for patent under the provisions of 30 U.S.C. 38, incorporating the mineral survey and other material contained in the present application so as to avoid unnecessary expenses.

George M. Cox is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $25. In taking an appeal there must be strict compliance with the regulations.

John B. Ciccolo
Acting Chief
Division of Appeals

Enclosure

DISTRIBUTION:

Mr. Neil J. Clarke, Attorney for Appellant (Certified Mail)
George M. Cox (Regular Mail)
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Bureau of Land Management
Washington 25, D. C.

In Reply Refer to:
6.05c
Contest No. 5859
February 1, 1962

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DECISION

United States, Contestant v. Berl Risley, Contestee	:	Panic, Panic Nos. 1,2,3, 4 and 5 Lode Mining claims and Panic No. 2 placer mining claim in Sec. 3, T.45 N., R. 7 W., MD Mer., California

Decision Vacated

Mr. Berl Risley has appealed from the decision of the Manager of the Sacramento Land Office dated October 27, 1961, which declared the above described mining claims to be null and void due to the failure of the appellant to file an answer to the charges in the contest complaint.

The action taken by the Manager was premature. The decision of the Manager was issued prior to the expiration of the time he allowed the contestee for submission of an answer to the notice of charges against the subject mining claims. Also, the request for an additional extension of time, filed in the land office on October 20, 1961, should properly have been considered prior to the rendering of a decision in the contest proceeding.

The decision of the Manager is vacated, and the case is remanded for further appropriate consideration.

John B. Piccolo
Acting Chief
Division of Appeals

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6.05c
Sacramento 068427

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 17, 1962

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DECISION

	:	Sierra Buttes
Pierce Wilson	:	Tunnel Site located on Lot 4,
	:	NE$\frac{1}{4}$SW$\frac{1}{4}$, Sec. 30, T.20N., R.12E.,
	:	MD Mer., California

Decision Vacated

Pierce Wilson has appealed from a decision, dated October 25, 1961, holding his Sierra Buttes Tunnel Site, located and recorded on October 3, 1961, null and void *ab initio* for the reason that a proposed withdrawal for State Highway No. 49 Roadside Zone was filed on September 28, 1961.

The record shows that the tunnel site was located on October 3, 1961, the proposed withdrawal for roadside zone was filed on September 28, 1961, and the proposed withdrawal was noted on the Land Office tract books on October 5, 1961.

An application for a proposed withdrawal does not segregate the lands from mineral location until the application is noted in the tract books or on the official plats maintained in the Land Office. (43 CFR, 1960 Supp. 295.11(a)).

Since the tunnel site was located 2 days prior to the notation of the proposed withdrawal on the Land Office tract books, the segregative effect of such notation was not applicable and, therefore, the Land Office decision improperly declared the tunnel site location null and void.

Accordingly, the decision is vacated, and the case is returned.

Richard J McCormick
Chief, Branch of Land Appeals
Division of Appeals

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appeal to Sec
affirmed A-29673

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In Reply Refer to:
6.05c
Sacramento 068470

May 29, 1962

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DECISION

LeRoy Otis Nauman and
Leola Fern Nauman

Mining Claim
L & L Placer, SW¼SW¼
Sec. 32, T. 11N., R. 9E.,
M.D.M., Calif.

Decision Affirmed

The above named persons have appealed from a decision, dated November 15, 1961, declaring their mining claim, located on October 20, 1961, null and void ab initio for the reason that the land upon which the claim was located is included in a First Form Reclamation Withdrawal, effective September 19, 1942.

The appellants allege, among other things, the Bureau of Reclamation is mistaken as to the location of the above-described land due to errors in the maps, and the decision is in conflict with Public Law 359 (69 Stat. 681), but they have submitted no evidence in support of their allegations.

The records show that on September 14, 1942 the Under Secretary of the Interior approved a recommendation of the Acting Commissioner, Bureau of Reclamation, which included the W½ sec. 32, T. 11 N., R. 9 E., M.D.M., in the American River Investigations, California, First Form Reclamation Withdrawal.

The withdrawal order was published in the Federal Register, as F.R. Doc. 42-9470, filed September 24, 1942; 10:10 a.m.

There is no merit to the allegation that the decision appealed from is in conflict with the act of August 11, 1955 (30 U.S.C., secs. 621-625; Public Law 359). Section 2 of that Act, referred to as the Mining Claims Rights Restoration Act of 1955 (30 U.S.C. sec. 621), provides in pertinent part that nothing therein shall affect the validity of withdrawals or reservations for purposes other than power development. Accordingly, the Act did not open to location land which was previously withdrawn for reclamation purposes. A. W. Kimball et al., 65 I.D. 166 (1958).

A mining claim located on land subject to a first form reclamation withdrawal initiates no rights in the locator and is void from its purported inception. Ralph M. Bostrom, A-27806 (December 23, 1958); 43 CFR 230.12.

Accordingly, the decision appealed from is affirmed.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

John B. Piccolo
Acting Chief,
Division of Appeals

Enclosure

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In reply refer to:
6.05c
Sacramento 068810

June 6, 1962
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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

DOCKET FILES

DECISION

Wm. M. Clingan :
S. Lorene Clingan :
Forest M. Clingan :
Molly Brewer :

Mineral Entry Application

Decision Affirmed

The above-named appellants have appealed from a decision of the Sacramento Land Office, dated January 22, 1962, rejecting mineral patent application, Sacramento 068810, for The Rock Pile Placer Mining Claim situated in secs. 25 and 26, T. 13 S., R. 26 E., MDM, California. The grounds for rejection was that the application was filed prior to posting on the claim a notice of intention to apply for patent. The decision pointed out other defects in the application; among them was the fact that the document presented as the application for patent was not signed.

The record shows that the purported application for mineral patent was filed on October 26, 1961. A copy of the notice of intention to apply for patent required to be posted on the claim by regulation 43 CFR 185.51 has not been furnished as is required by 43 CFR 185.53. The statement of W. H. Kelly and Byron W. Rector, filed on November 6, 1961, however, discloses that such posting occurred on November 2, 1961.

The appellants contend that the objections to the application "are mere technicalities which can be readily corrected and have no bearing whatsoever on the actual legality or value of our claim."

The deficiencies stated in the Land Office decision concern the acceptability of the application for processing and it in no way relates to the legality of the mining claim. This is clearly evidenced by the statement in that decision that the rejection of the application is without prejudice to the right of the claimants to file a proper application. In this we concur.

The regulations were promulgated to provide an orderly and uniform procedure for filing applications for mineral patent, which must be followed. The posting of a notice of intention to apply for a mineral patent prior to the filing of the patent application is contemplated by the regulations and where the events occur in the reverse order, such as here, the application will be rejected. Accordingly, the decision appealed from is affirmed.

Furthermore, an unsigned document is a nullity and has no standing. Therefore, the unsigned application for mineral patent should have been returned to the one who submitted it.

note

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

John B. Piccolo
Acting Chief,
Division of Appeals

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DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

DEPT. OF INTERIOR
SACRAMENTO, CAL.
JUN 18 10 00 AM 1962
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In Reply Refer to:
6.05c
Sacramento 067696-BRR
M:JS

June 6, 1962

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DECISION

Robert F. Kalklosch	:	Mining Claim,
	:	Verified Statement

Decision Affirmed

Mr. Robert F. Kalklosch has appealed from a decision, dated April 11, 1962, rejecting his verified statement filed pursuant to the Act of July 23, 1955 (69 Stat. 367), for the reason that it was not filed within the 150-day period following the publication of a notice to mining claimants as required by the Act.

In his appeal, Mr. Kalklosch states, in essence, that he intended to submit the verified statement within the 150-day period but that he miscalculated the termination date of the period. He asserts that it would be inequitable to refuse his statement merely because he erred in this respect.

As the appellant failed to submit his verified statement within 150 days of the date of publication as required by the Act of July 23, 1955, supra, the statement was not timely filed and was properly rejected. Mena Mining & Exploration Company, 66 I.D. 228 (1959). Both the Bureau of Land Management and the claimant are bound to observe the above cited law as it is written. Hence, as the claimant has failed to meet the requirements of the law, the Bureau is without authority to save him from the consequences of his failure. Hines Gilbert Gold Mines Co., 65 I.D. 481 (1958).

Accordingly, the decision appealed from is affirmed.

Mr. Kalklosch is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

John B. Piccolo
Acting Chief
Division of Appeals

Enclosure

The appellant is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

John B. Ciccolo
Acting Chief
Division of Appeals

Enclosure

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Mr. Charles G. Munson (Regular Mail)
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DEPARTMENT OF THE INTERIOR
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Washington 25, D. C.

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In reply refer to:
6.05c
Sacramento 067696-PPP
M:JS

June 19, 1962

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DECISION

Glen A. and Paul A. Oakes : Tallow Candle Placer Mining Claim, situated in the NE$\frac{1}{4}$ SE$\frac{1}{4}$ sec. 17, T. 10 N., R. 7 E., H.B.M., Siskyou County, California

Decision Affirmed

The above-named parties have appealed from a decision, dated April 9, 1962, rejecting their verified statement filed pursuant to the act of July 23, 1955 (69 Stat. 367), for the reason that it was not filed within 150 days after a notice to mining claimants was published in a newspaper of general circulation in the county wherein the lands involved are situated.

In their appeal, the claimants state that they did not file their verified statement within the 150-day period prescribed because one of them was sick and could not make the trip to Ukiah, California, where the quit claim deed to their claim was in a safe deposit box.

The record shows that the notice to mining claimants was first published on September 20, 1961; that the 150th day was February 17, 1962, a Saturday, so the period within which a verified statement could be submitted expired February 19, 1962; and that the appellants' verified statement was filed on March 23, 1962.

As the appellants failed to submit their verified statement within 150 days of the date of publication as required by the act of July 23, 1955, supra, it was properly rejected. Mena Mining & Exploration Company, 66 I.D. 228 (1959). Both the Bureau of Land Management and the claimants are bound to observe this law as it is written. Hence, as there has been a clear failure to meet the requirements of the law, the Bureau is without authority to save the claimants from the consequences of their failure. Hines Gilbert Gold Mines Co., 65 I.D. 481 (1958).

Accordingly, the decision appealed from is affirmed.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken, the amount of the filing fee will be $5.00. In taking an appeal, there must be strict compliance with the regulations.

John B. Piccolo
Acting Chief
Division of Appeals

Enclosure

Glenn A. & Paul A. Oakes (Certified Mail)
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WASHINGTON 25, D. C.

IN REPLY REFER TO:
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Sacramento
070403

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SACRAMENTO, CAL.

JUL 9 10 00 AM 1962
BUREAU OF
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LAND OFFICE

JUL - 5 1962

Placer Mining Claim

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DECISION

George and Myrna Vesely :
:

Appeal From Decision of
March 26, 1962
Notice of Appeal Filed
April 25, 1962

Appeal Dismissed

For the reason listed below your appeal to the Director, Bureau of Land Management, is hereby summarily dismissed (43 CFR 221.98):

☒ No statement of reasons has been filed in support of the appeal, and the time for filing the statement has expired (43 CFR 221.3).

☐ Your statement of reasons for your appeal (or your request for extension of time to file a statement of reasons) was filed in this office, but it was filed late. (43 CFR 221.3). The statement of reasons was transmitted to this office after expiration of the period allowed, and the delay in filing cannot be waived. (43 CFR 221.92(b)).

☐ You have not served the adverse party named in the decision appealed from with a copy of ☐ the notice of appeal, and/or ☐ the statement of reasons for the appeal, in the manner prescribed in 43 CFR 221.95. (43 CFR 221.4).

☐ Your appeal does not point out wherein the decision appealed from is believed to be in error and consequently you have failed to state reasons for the appeal, as required by the rules of practice. See Duncan Miller, 65 I.D. 292.

The dismissal of an appeal for failure to comply with the above requirements is mandatory. We have enclosed Form 4-1364 which contains the cited regulations.

You are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in enclosed Form 4-1365. 1/ If you do not appeal we will close the case and return the record to our State Director for further appropriate action. If an appeal is taken the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

John B. Piccolo
Acting Chief, Division of Appeals

Enclosures 2

1/ The adverse party to be served is: NONE

cc: George and Myrna Vesely (Certified Mail)
SD (California)
LO (Sacramento) ✓

Appealed to Secretary by Calif Alluv. Min Corp

e return to file, 1 cp only

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appeal to Sec'y

affirmed A 29806
11-13-63

DEPT. OF INTERIOR
SACRAMENTO, CAL.

SEP 17 10 01 AM 1962

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In reply refer to:
6.05c
Sacramento 070384

September 7, 1962

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

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DECISION

California Alluvial Mining Corporation : Mineral Patent Application

Decision Affirmed in Part and Reversed in Part

California Alluvial Mining Corporation has appealed from a decision dated April 24, 1962, rejecting in part its mineral patent application. The basis for the decision was that the discovery point in the claim involved, the Snow White, located in the SE¼ sec. 13, T. 26 N., R. 8 E., M.D.M., is alleged to be in that portion of the claim, the E½W½SE¼, that along with the W½E½SE¼ of the same section had been withdrawn from all forms of appropriation under the public land laws prior to the location date of the claim, and that therefore the land was not subject to location, rendering the entire claim null and void *ab initio*. The record shows the described E½W½SE¼, W½E½SE¼ sec. 13, above township and range, were withdrawn for Forest Service ranger station purposes on November 2, 1906, and that the Snow White mining claim was located on October 2, 1944.

The appellant contends that the decision is in error in its ruling that the discovery point is solely within the area of the withdrawal. It states further that the area of the entire claim has been used extensively by the appellant in its mining operations, with knowledge of the agency having jurisdiction over the withdrawn land, and that there has been non-user of the land by that agency since the withdrawal.

The record shows, as noted by the appellant, that although discovery has been alleged within the E½W½SE¼, the excavation in which the discovery is claimed also extends westward and traverses the W½W½SE¼ of the section involved, which is not within the withdrawn area. In the circumstances, the decision appealed from is in error in its finding as to the location of the discovery point solely within the withdrawn area and its consequent ruling that the entire claim is null and void on that account. The claim remains intact as to the W½W½SE¼ sec. 13, as well as the mineral patent application therefor, and the decision is reversed to so hold. However, the decision was correct in holding that those portions of the claim situate within the area of the ranger station withdrawal were not subject to location and therefore that the claim is null and void *ab initio* as to these lands. The lands were withdrawn by the Secretary of the

Appealed to Secretary
by Calif Alluv. Min. Corp

SEP 17 10 29 AM 1952

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Appealed to Secretary
by Calif Alluv. Min Corp

Interior, for the purposes stated, as shown above, and the withdrawal has not been revoked. 1/

The case record will be remanded for further processing of the mineral patent application when this decision becomes final.

The appellant is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken the adverse party to be served is:

Regional Forester
Forest Service
United States Department of Agriculture
630 Sansome Street
San Francisco 11, California

Dale E Zimmerman
Chief, Division of Appeals

Enclosure

DISTRIBUTION:
Gilmore & Gilmore, agents for the appellant (Certified Mail)
California Alluvial Mining Corporation (Regular Mail)
Regional Forester, California (Regular Mail)
SD (California)
LO (Sacramento)
Division of Minerals (4)
Case File
Perm. File
Appeals Reading File
Attorneys' Reading File
DWG

1/ Concerning the appellant's request for revocation of the ranger station withdrawal, it may direct such request to the Forest Supervisor of the Plumas National Forest for consideration and initiation, if appropriate, of a request to the Secretary of the Interior for revocation of the withdrawal.

appeal taken 2-8-0

To be filed

DOCKET FILES

SEP 24 10 32 AM 1962

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.

IN REPLY REFER TO:
6.05c
Sacramento
071234
Mining Claim

Certified Mail
Return Receipt Requested

SEP 10 1962

DECISION

Appeal From Decision of
June 11, 1962
Notice of Appeal Filed
July 11, 1962

Mrs. Jeanne T. Fuller :
v. :

Appeal Dismissed

For the reason listed below your appeal to the Director, Bureau of Land Management, is hereby summarily dismissed (43 CFR 221.98):

☐ No statement of reasons has been filed in support of the appeal, and the time for filing the statement has expired (43 CFR 221.3).

☒ Your statement of reasons for your appeal (or your request for extension of time to file a statement of reasons) was filed in this office, but it was filed late. (43 CFR 221.3). The statement of reasons was transmitted to this office after expiration of the period allowed, and the delay in filing cannot be waived. (43 CFR 221.92(b)).

☐ You have not served the adverse party named in the decision appealed from with a copy of ☐ the notice of appeal, and/or ☐ the statement of reasons for the appeal, in the manner prescribed in 43 CFR 221.95. (43 CFR 221.4).

☐ Your appeal does not point out wherein the decision appealed from is believed to be in error and consequently you have failed to state reasons for the appeal, as required by the rules of practice. See Duncan Miller, 65 I.D. 292.

The dismissal of an appeal for failure to comply with the above requirements is mandatory. We have enclosed Form 4-1364 which contains the cited regulations.

You are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in enclosed Form 4-1365. 1/ If you do not appeal we will close the case and return the record to our State Director for further appropriate action. **If an appeal is taken the amount of the filing fee is $5. In taking an appeal there must be strict compliance with the regulations.**

Dale E. Zimmerman
Chief, Division of Appeals

Enclosures 2

1/ The adverse party to be served is: **None**

cc:
Melvin C. Kerwin, c/o Small and Werthimer, Attorneys for appellant (Certified Mail)
Mrs. Jeanne T. Fuller (Regular Mail) SD (California); LO (Sacramento)

102172

appeal to Sec 055 848

affirmed A-29813
11-19-63

DOCKET FILES

DEPT. OF INTERIOR
SACRAMENTO, CAL.
SEP 24 10 32/33 AM 1962
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

6.05e
Contest 5895
(Sacramento)

September 14, 1962

Certified Mail
Return Receipt Requested

United States

v.

Bradley-Turner Mines, Inc.

DECISION

Lucky Seven placer mining claim, Bradley-Turner Nos. 2, 3 and 4, and Aellene placer mining claims, included in mineral patent application Sacramento 055848.

Decision Affirmed

Bradley-Turner Mines, Inc., has appealed from a decision dated February 26, 1962, which declared its above-described mining claims, situate within Tahoe National Forest, in sec. 32, T. 19 N., R. 9 E., M.D.M., California, null and void and rejected its application for patent. The decision was based upon a failure by the appellant to file an answer to a complaint issued in conjunction with adverse proceedings initiated by the Forest Service against the claims. The decision held this failure to constitute an admission of the truth of the charges and the case was decided without a hearing upon the charges so admitted, namely, that a valid discovery was lacking upon each of the claims, that the lands embraced in two of the claims were nonmineral in character, and that sufficient improvements had not been made upon four of them.

The record shows personal service of the contest complaint in the proceeding, dated November 30, 1961, was had upon the attorney for the contestee on December 7, 1961, and that no response was made thereto for the contestee as required by 43 CFR 221.64. Under the Department's rules governing Government contests against mining claims, a mining claimant loses his right to a hearing in a contest against his mining claims by his failure to file an answer denying the charges against the claims within the time allowed by the rules of practice, and his claims may properly be declared null and void. United States v. Raymer Garnett et al., A-28545 (January 31, 1961); 43 CFR 221.65, 221.68.

The appellant does not deny the correctness of the finding that there was a failure to file an answer to the contest complaint, as required by the regulations. The appellant contends that since it submitted its final showing, published its application for patent and paid the purchase price, title equivalent to an estate in fee passed from the Government to the appellant, and the Government was barred from interposing a contest in the case.

The contention is untenable. The authority of this Department to supervise and control the sale and disposition of the public domain, including mineral lands, has long been recognized. Knight v. United States Land Association, 142 U.S. 161 (1891). Its jurisdiction to inquire into the extent and validity of rights to public land claimed against the Government does not cease until the legal title to the land has passed. Michigan Land and Lumber Co. v. Rust, 168 U.S. 589, 593 (1897). "A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws." Cameron et al. v. United States, 252 U.S. 450, 460 (1920). As the Supreme Court said in the Cameron case, "the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice, *** to determine whether the claim is valid and, if it be found invalid, to declare it null and void."

The regulations relating to mineral entries within national forests (43 CFR Part 205) require that the Department of Agriculture shall be notified of applications for patents (43 CFR 205.2) and they do not impose a mandatory time limit within which a protest against a mineral entry must be filed by the Department of Agriculture. The cited regulation provides that a protest on behalf of that Department may be made against a claim at any time prior to the issuance of patent or confirmation of the entry.

That the appellant filed its application for patent, published notice thereof, and paid the required purchase moneys does not diminish the Government's authority to inquire into the merits of the claims. Unless there has been a discovery of valuable minerals within the limits of the claims, there have been no valid locations and the claims cannot go to patent. That no adverse claim was filed within the publication period nor prior to payment of the purchase moneys did not vest equitable title in the appellant. As between the Government and a patent applicant, equitable title does not pass until the Government has determined that all the requirements of the law have been met, and until such determination is made, it has ample authority to entertain the contest of the Department of Agriculture and to order adverse proceedings against the validity of the claims. United States v. Al Sarena Mines, Inc., 61 I.D. 285 (1954).

Accordingly, the decision appealed from is affirmed.

The appellant is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision, the total filing fee will be $25. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken, the adverse party to be served is:

Regional Forester
Forest Service
U. S. Department of Agriculture
630 Sansome Street
San Francisco 11, California

Dale E. Zimmerman
Chief, Division of Appeals

Enclosure

DISTRIBUTION

Mr. Charles L. Gilmore, Attorney for Appellant (Certified Mail)
Bradley-Turner Mines, Inc. (Regular Mail)
Adverse Party Listed (Regular Mail)
SD (California)
LO (Sacramento)
Division of Minerals (4)
Case Files
Permanent File
Appeals Reading File
Attorneys' Reading File
DWG

In reply refer to:
6.05c
Sacramento 068430-068436 incl.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

September 17, 1962

DOCKET FILES

DECISION

Mary Hope Westbrook : Prospecting Permit Applications
Moab Drilling Company, Inc. :

Decisions Vacated
Cases Remanded

These are appeals from separate decisions dated June 18, 19, and 20, 1962 rejecting in part the above-noted applications for prospecting permits on certain acquired lands situated within the Toiyabe National Forest because the Forest Service, U.S. Department of Agriculture, stated that these lands include recreation areas and watershed rehabilitation projects and oil and gas leasing would be incompatible with such uses, therefore, that these lands should be eliminated from the permits.

In a letter dated August 23, 1962, the Regional Forester, Intermountain Region, U.S. Department of Agriculture, informed the Sacramento Land Office that the Forest Service and applicants have reached an agreement on the types of prospecting to be employed and the Forest Service has, therefore, withdrawn its objection to the issuance of permits in these cases.*

Accordingly, the decisions appealed from are vacated and the cases are remanded to the State Director for California for further appropriate action.

Frances A. Patton

Chief, Branch of Mineral
Leasing Appeals
Division of Appeals

DISTRIBUTION:
Mary Hope Westbrook (Regular Mail)
Moab Drilling Company (Regular Mail)
SD (California) with case records Sacramento 068430-068436 incl.
LO (Sacramento)
Case Files
Perm. File
Appeals Reading File
Attorneys' Reading File
JBJ

*It is observed that only lands which are acquired in accordance with the statutes and in the circumstances set forth in 43 CFR 200.32 are subject to the regulations. If acquired lands under the jurisdiction of the Department of Agriculture do not come under the purview of 200.32, there is no authority for the Secretary to issue prospecting permits for them.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.

IN REPLY REFER TO:
6.05c
Sacramento
068467-EEE

Verified Statement

OCT 15 1962

OCT 19 10 00 AM 1962
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

Certified Mail
Return Receipt Requested

William David Main, Jr.	DECISION : :	Appeal From Decision of June 21, 1962 Notice of Appeal Filed July 26, 1962

Appeal Dismissed

For the reason listed below your appeal to the Director, Bureau of Land Management, is hereby summarily dismissed (43 CFR 221.98):

☒ No statement of reasons has been filed in support of the appeal, and the time for filing the statement has expired (43 CFR 221.3).

☐ Your statement of reasons for your appeal (or your request for extension of time to file a statement of reasons) was filed in this office, but it was filed late. (43 CFR 221.3). The statement of reasons was transmitted to this office after expiration of the period allowed, and the delay in filing cannot be waived. (43 CFR 221.92(b)).

☐ You have not served the adverse party named in the decision appealed from with a copy of ☐ the notice of appeal, and/or ☐ the statement of reasons for the appeal, in the manner prescribed in 43 CFR 221.95. (43 CFR 221.4).

☐ Your appeal does not point out wherein the decision appealed from is believed to be in error and consequently you have failed to state reasons for the appeal, as required by the rules of practice. See Duncan Miller, 65 I.D. 292.

The dismissal of an appeal for failure to comply with the above requirements is mandatory. We have enclosed Form 4-1364 which contains the cited regulations.

You are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in enclosed Form 4-1365. 1/ If you do not appeal we will close the case and return the record to our State Director for further appropriate action. If an appeal is taken the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

Chief, Branch of Mining
and Grazing Appeals

Chief, Division of Appeals

Enclosures 2

1/ The adverse party to be served is: None
cc: Mr. William David Main, Jr. (Certified Mail)
SD (California); LO (Sacramento)

DOCKET FILES

In reply refer to:

6.05c
Sacramento 056599

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

October 17, 1962

DECISION

David L. King

Amy-K Placer Mining Claim located in the E½SE¼ sec. 3, T. 22 N., R. 11 E., M.D.M., California, within the Plumas National Forest

Decision Vacated

Mr. David L. King has appealed from the decision of the Chief, Minerals Section, Sacramento Land Office, dated March 23, 1962, rejecting the above-identified amended application for mineral patent to the above named mining claim, filed by the appellant and Mrs. Kathryn King. The decision rejected the application for the stated reason that the case record shows discovery points were not available on the mining claim for inspection by government examiners at the time the application was filed, and the appellant has not offered an acceptable showing to warrant the allowance of additional time to do the necessary development work.

The Bureau's State Director for California has indicated that the decision appealed from be vacated, and the case returned to the Land Office for consideration of the amended mineral patent application.

Accordingly, the Land Office decision of March 23, 1962 is hereby vacated, and the case returned to the Land Office Manager at Sacramento, California, through the Bureau's State Director for California, for consideration and appropriate action.

John B. Piccolo
Chief, Branch of Mining and Grazing
Appeals
Division of Appeals

DISTRIBUTION:

Mr. David L and Mrs. Kathryn King (Regular Mail)
Regional Forester (California Region), Forest Service, U.S.D.A. (Regular Mail)
Mr. John Sieker, Div. of Recreation & Land Uses, Forest Service, U.S.D.A. (Regular Mail)
SD (California) w/case file.

Distribution continued on reverse

LO (Sacramento)
Division of Minerals
Case File
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Attorney's Reading File
Appeals Reading File
JHO'D

JAN 21 1963

DOCKET FILES

In reply refer to:
[illegible]
Contest No. [illegible] (Sacramento)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

January [illegible], 1963

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Charles A. Brown
Margaret L. Brown
[illegible] Dorff
[illegible] Dorff

Contestees [illegible] the above [illegible] placer mining claim, situated in [illegible] Sec. [illegible], T. [illegible] N., R. [illegible] E., M.D.M., [illegible] County, California

Decision Affirmed

The above-named parties have appealed from a decision of the [illegible] dated July [illegible], 1962, declaring null and void the above-identified placer [illegible] because none of the contestees filed an answer [illegible] specifically [illegible] the allegations of the [illegible] within the time allowed by the regulations 43 CFR 221.[illegible]. [illegible] 1/

The appellants have filed [illegible] appeals in which they state that they [illegible] the claim [illegible] that they have [illegible] all letters and papers [illegible] Land Office, that they obtained possession of the claim [illegible] from a man who had worked it for [illegible] years and [illegible] improvements to the claim, and that, if the land [illegible] for public sale, they should be permitted to [illegible] because of the improvements they have placed on the land.

The regulations 43 CFR 221.[illegible] and 221.[illegible] read, in part, as follows:

> "[illegible] 30 days after service of the [illegible] or after the last publication of the notice, the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint [illegible]

1/ The complaint charged (1) that the land embraced within the claim [illegible] and (2) that [illegible] of the claim [illegible] a valid discovery.

LAND OFFICE
SACRAMENTO CALIF.
JAN 28 1963
A.M. P.M.
7|8|9|10|11|12|1|2|3|4|5|6

4.3

DOCKET FILES

In reply refer to:
6.05c
Contest No. 5847 (Sacramento)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

January 15, 1963

Certified Mail
Return Receipt Requested

DECISION

Charles A. Brown Katherine L. Brown Byron Durff Addie Durff	: : :	Involving the Abbie May placer mining claim, situated in S½ Sec. 22, T. 24 N., R. 3 E., M.D.M., Butte County, California

Decision Affirmed

The above-named parties have appealed from a decision of the Manager, dated July 26, 1962, declaring null and void the above-identified placer mining claim for the reason that none of the claimants filed an answer specifically meeting or responding to the allegations of the contest complaint within the time allowed by the regulation 43 CFR 221.64. The Manager held that the failure to answer properly is an admission of the truth of the charges set forth in the complaint. 1/

The appellants have filed identical appeals in which they state that they do not believe the claim is nonmineral in character, that they have answered all letters and legal notices sent to them by the Sacramento Land Office, that they obtained possession of the claim 12 years ago from a man who had worked it for 37 years and have since made substantial improvements in the claim, and that, if the land embraced by the claim is offered for public sale, they should be permitted to bid for it because of the improvements they have placed on the land.

The regulations 43 CFR 221.64 and 221.65 read, in part, as follows:

> "Within 30 days after service of the complaint or after the last publication of the notice, the Contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint, * * *."

1/ The complaint charged (1) that the land embraced within the claim is nonmineral in character, and (2) that minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery.

> "If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing."

In the instant case, copies of the complaint were served on the Browns on September 15, 1961. They responded with a letter dated September 28, 1961, in which they stated that they are part owners of the claim, and that they have no intention of "canceling the Mineral entry." They stated that they have claimed the land for several years, kept up the assesment work, and have paid taxes on the land. Addie Durff was served on April 27, 1961, but made no response whatever. Byron Durff was served on December 9, 1961. In an undated letter received in the Land Office on December 20, 1961, he stated that assesment work on the claim has been done for the last ten years and that he had no intention of "cancelling the mining claim."

It is our opinion that the letters discussed in the preceeding paragraph do not specifically meet or respond to the allegations of the contest complaint. The owner of a mining claim is presumed to know the nature and quality of the discovery serving as the legal basis for his location[2] and, when challenged by a contest complaint issued by the United States, is presumed to have the requisite knowledge to admit or deny the various allegations of the complaint. United States v. M.V. Browning, Administrator, 68 I.D. 183 (1961). In the instant case, the responses submitted by the Browns and Mr. Durff state, in essence, that they are part owners of the claim, that they have paid taxes levied on the claim and have done the annual assesment work, and that they do not intend to voluntarily relinquish the claim. They neither admit nor deny that the land embraced by the claim is nonmineral in character and that there is on the claim no valid discovery, the allegations of the complaint.

Accordingly, the decision of the Manager is affirmed.

In the event the land is offered for public sale, the appellants will be free to submit bids. They have, however, acquired no preference right to the land by virtue of the improvements they have made as mining claimants.

---

[2] In the absence of a valid discovery, a location of a mining claim is ineffective against the United States and is null and void. Cole v. Ralph, 252 U.S. 286 (1920).

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

John B. Piccolo

Chief, Branch of Mining and
Grazing Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Addie Durff (Certified Mail)
Byron A. Durff (Certified Mail)
Charles A. Brown (Certified Mail)
Katherine L. Brown (Certified Mail)
SD (California)
LO (Sacramento)
Case File
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Attorneys' Reading File
Division of Minerals (5)
LLM

RECEIVED
LAND OFFICE
SACRAMENTO, CALIF.
JAN 28 1963
A.M. 7|8| |3|4|5|6 P.M.
A

H2a 055221

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
6.05c
Contest No. 5888
(California)

January 16, 1963

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DOCKET FILES

DECISION

United States, :
Contestant-Appellee, :
:
v. :
:
Clovis M. Laidet, :
Contestee-Appellant. :

Involving the Good Luck Lode mining claim, situated in Secs. 29 and 32, T. 6 N., R. 14 E., M.D.M., Calaveras County, California.

Decision Affirmed

Mr. Clovis M. Laidet has appealed from a Hearing Examiner's decision, dated June 27, 1962, which dismissed his motion to dismiss the contest complaint, rejected his patent application and declared null and void the above-identified mining claim for lack of discovery.

The Bureau of Land Management initiated contest proceedings against the mining claim, charging in its complaint: (1) that the land embraced within the limits of the claim is nonmineral in character, and (2) that minerals have not been found within the limits of the claim in sufficient quantity and quality to constitute a valid discovery.

The contestee's answer to the Bureau's complaint contained a general denial of the charges and a motion to dismiss the complaint. In connection with the motion to dismiss, the contestee asserted, in essence, that neither the Bureau nor the Department of the Interior has jurisdiction to initiate the complaint because he has equitable title to the claim as the Bureau has accepted the purchase money he tendered with his patent application and the only act remaining to be done is the ministerial act of issuing a patent to the claim. The motion to dismiss was denied by the Hearing Examiner in a decision dated January 22, 1962, and on May 8, 1962, a hearing was held to determine the truth of the charges alleged by the contestant.

Mr. Laidet was not present at the hearing in person but was represented by his attorney who, at the outset of the hearing, filed a motion entitled "Exceptions to Jurisdiction." This motion, in substance a motion to dismiss for the same reasons previously considered by the Hearing Examiner, was dismissed, at which time the contestee's attorney left the hearing. The contestant, nevertheless, presented the evidence it had assembled to establish a prima facie case in support of its complaint.

Mr. Lewis S. Zentner, a valuation engineer, mining, for the Bureau of Land Management, testified that he had visited the contested claims on four occasions. He stated that on his first visit he found that none of the workings were accessible, but that he examined the point marked "Discovery Point" on the claim and took a sample of the quartz found there (Tr. 6-7). This sample, identified as "L-1," was assayed at $1.23 per ton for its gold content. On July 17, 1961, Mr. Zentner examined the claim in the presence of the contestee, taking three samples. At that time, the contestee selected a sample from a stockpile of material outside the mine entrance which was also assayed (Tr. 8-9). The witness testified, however, that this was not a representative sample of the material found in the stockpile, but that it was one which would show the highest content of gold (T. 12-13). The samples, identified as "GL-1, GL-2, GL-3, GL-4," assayed at $6.83, $2.98, $8.40, and $11.38 per ton respectively. (Tr. 11-12, 16, Exhibit No. 6). Mr. Zentner testified that there is not exposed on the claim a valuable mineral in such quantities as would justify a reasonably prudent person in expending further time and money with a reasonable expectation of developing a paying mine, and that the land within the boundaries of the claim are not valuable for their mineral content (Tr. 15).

The contestant then called Mr. George O. Scarfe, Jr., also a valuation engineer, mining, employed by the Bureau of Land Management. He testified that he examined the claims with Mr. Zentner on June 13, 1961, and on May 3, 1962. He stated that a 12-inch assay sample, identified as "S-16," was taken during the May 3 examination. This sample assayed at $26.84 per ton, but the witness explained that a mine must have a minimum width of 30 inches, which means that the value of the gold per ton of material extracted from the mine would be reduced to $10.74 (Tr. 17-22). Mr. Scarfe also testified that a reasonably prudent man would not be justified in expending further time and money with the expectation of developing a paying mine, and that the land within the boundaries of the claim is not valuable for its mineral content (Tr. 25).

The Hearing Examiner concluded, in view of the uncontradicted evidence presented by the contestant, that no discovery of a valuable mineral has been made within the meaning of the mining laws of the United States. He also concluded that, as the claim is null and void for want of discovery, there is no need to consider the merits of the charge that the land is nonmineral in character.

In his appeal, the contestee alleges that the testimony of the contestant's witnesses shows that a valid discovery has been made within the boundaries of the claim. He states, however, that the point upon which his appeal is founded is that he has paid for the land, and that when the Bureau of Land Management issued a receipt for the purchase price the United States became his trustee, holding the land for him. He states that it is useless to quote decisions of the court in support of this proposition because the basic fundamental law of a free nation, the basic law merchant of the land, has reiterated over and over the principle that, when one pays for a thing then in existence, and the owner of the thing takes the purchase price, issues a receipt and keeps the purchase money, the title to the thing purchased passes to the buyer. In essence, the contestee claims that he is the equitable owner of the claim and that the United States is foreclosed from initiating the contest.

It appears to be the contestee's theory that a trace or a showing of mineral in place is sufficient to support a lode mining claim, and that, as the assay reports submitted by the contestant's witnesses show that gold having a dollars and cents value may be taken from the mine, there is, in fact, a discovery within the boundaries of the claim. There are, however, three essential requirements necessary to establish a valid discovery on a lode mlining claim. They are: (1) There must be a vein or lode of quartz or other rock in place; (2) The quartz or other rock in place must carry gold or some other valuable mineral deposit; and (3) the two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine. Jefferson - Montana Copper Mines Co., 41 L.D. 320 (1912). In connection with the third requirement, it has been held that the value which sustains a discovery must be such that with actual mining operations under proper management a profitable venture may reasonably be expected to result. Chrisman v. Miller, 197 U.S. 313 (1905). The contestee's theory completely overlooks the third requirement.

The contestee's contention that the United States is barred from initiating the contest proceeding is likewise without merit. The arguments submitted by the contestee in support of this contention have been repeatedly considered by the Department of the Interior, as well as the courts, and have been consistently rejected. A recent case in point is Union Oil Company of California v. Udall, 289 F. 2d 790 (1961). In that case, the Union Oil Company contended that it acquired equitable title to several claims when it paid the purchase price and received a final receipt. The court held, however, that, even if it be assumed arguendo that the oil company acquired equitable title by payment and receipt, it is well established that until legal title has passed, the

Secretary of the Interior may make further inquiry into the validity of claimed rights to public land. It cited for authority the cases of Cameron v. United States, 252 U.S. 450 (1920); Michigan Land & Lumber Co. v. Rust, 168 U.S. 589 (1897); Orchard v. Alexander, 157 U.S. 372 (1895); and Ickes v. Underwood, 141 F. 2d 546. The Court found, in the Union Oil case, supra, that the case of Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428 (1892), a case cited by the contestee in support of his motion to dismiss the contest complaint, was not in point. Cf. Union Oil Co. et al., 65 I.D. 245, 248 (1958); United States v. Al Sarena Mines, Inc., 61 I.D. 280, 283-285 (1954). Hence, the motion to dismiss the contest complaint was properly dismissed.

Accordingly, the decision of the Hearing Examiner declaring the mining claim null and void is affirmed.

Mr. Laidet is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

In the event an appeal is taken, the adverse party to be served will be:

Regional Solicitor
Department of the Interior
Post Office Box 21-4527
Sacramento 21, California

Hoffman

Assistant Director

Enclosure

DISTRIBUTION:
Gilmore and Gilmore, Agents for the contestee, Sacramento, California (Certified Mail)
Office of the Regional Solicitor, U.S. Department of the Interior (Regular Mail)
Mr. Clovis M. Laidet (Regular Mail)
Mr. Lewis F. Fox, Office of Regional Solicitor (Regular Mail)
Hearing Examiner Paul A. Shepard (Regular Mail)
Office of the Hearing Examiners
SD (California)
LO (Sacramento)
Administrative Assistant, Hearings
Division of Minerals (5)
Case file; Perm. file; Appeals Reading file
Attorney's Reading File
LLM

appeal to Sec
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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
6.05c
Contest No. 5891,
California

January 23, 1963

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DOCKET FILES

DECISION

United States,
Contestant-Appellee,

v.

Thor W. Paulsen
Romagne E. Paulsen,
Contestees-Appellants

Involving the Arlington and U.S. Placer mining claims, situated in Sec. 4, T. 19 N., R. 6 E., M.D.M., California, and in the Plumas National Forest.

Decision Affirmed

Thor W. and Romagne E. Paulsen have appealed from a Hearing Examiner's decision, dated July 24, 1962, which rejected the contestees' patent application and declared null and void the above-identified placer mining claims for lack of discovery.

Contest proceedings were brought against the Paulsens by the United States by and through the Manager of the Bureau of Land Management's Sacramento Land Office, pursuant to an official request of the Regional Forester, Forest Service, United States Department of Agriculture, California Region.[1] The contest complaint charged that a discovery of a valuable mineral deposit has not been made within the limits of the claims. The contestees' answer contained a general denial of the charge made by the complaint and a motion to dismiss the complaint for the reason that neither the Bureau of Land Management nor the Department of the Interior has jurisdiction to bring the contest. The motion states, in essence, that the contestees are the equitable owners of the claims because they have paid to the Bureau the purchase price of the claims and have been issued an official receipt for the money, which is still in the possession of the Bureau.

In a decision dated January 8, 1962, the Hearing Examiner denied the contestees' motion to dismiss, holding that the Department of the

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[1] The Hearing Examiner begins his decision with the statement "The United States Forest Service, Department of Agriculture, initiated adverse proceedings against the mining claims * * *." The statement is inaccurate. As the contest complaint states, the contest was initiated by the United States, by and through the Manager of the Land Office pursuant to a request of the Forest Service (T. 3-4).

Interior can inquire into the validity of a mining claim until a patent is issued, at which time the legal title to the land passes to the patentee.

On March 8, 1962, the Hearing Examiner issued a Notice in which he directed the contestees and three other mining claimants to appear at a conference. The contestees did not, however, participate in the prehearing conference. Instead, they filed a brief in which they listed their objections to the proceedings. In the brief, they reiterated their contention that the Department is foreclosed from bringing the action in view of their equitable ownership of the mining claims. They also argued that the joinder of other parties not having a common interest in the same lands was improper[2], and that, as no hearing date had been set, the conference was a "fishing expedition" for the benefit of the Forest Service. They contended that the Hearing Examiners presiding over such contests have not been appointed under, nor are they acting within, the provisions of the Administrative Procedure Act (60 Stat. 237; 5 U.S.C.A. 1001 et seq.). In conclusion, the contestees' asserted that there was no authority for holding a prehearing conference in this case, that they would waive the Constitutional rights guaranteed by the Fifth Amendment if they concurred in the action of the Hearing Examiner, and that there is no authority for an attorney for the Department of Agriculture to appear on behalf of the Bureau of Land Management in any hearing or prehearing conference.

The contestees were subsequently notified that a hearing would be held on June 15, 1962. Although not personally present at the hearing, the contestees were represented by their attorney who, at the commencement of the hearing, filed "exceptions and objections to the proceeding" which states that the contest must be dismissed because the Bureau has no jurisdiction over the matter, because the Bureau of Land Management was not represented by counsel, and because the contest was being maintained by the Forest Service for the use and benefit of a private agency and not for the United States of America. When this motion was dismissed by the Hearing Examiner, the attorney withdrew from the proceedings and left the hearing room.

2/ The joinder of the contestees with the other parties listed in the Notice, Patricia Lemoge Hudelson and John and Alfred Olson, was prompted, no doubt, by the fact that these claimants had retained the same attorneys, the firm of Gilmore & Gilmore, to represent them in contest proceedings which were then pending against their several claims. In each case, Contest Nos. 5889, 5890, and 5891, the agents sent identical letters, dated March 23, 1962, advising the Hearing Examiner that the claimants would not be able to appear at the prehearing conference.

The contestant called as its' witness Mr. William L. Johnson, a mining engineer for the Forest Service, United States Department of Agriculture. After qualifying himself as an expert in his field, Mr. Johnson testified, in substance, that the claims consist of lands which were systematically and thoroughly mined in the past, possibly the 1860's, that he found no possible placer ground which had not been worked over in the early days, and that the only places one can expect to find gold on the claims are the small spots overlooked by the earlier miners. He testited that this would not be a profitable venture, and that a prudent person would not be justified in expending further time and money with the expectation of developing a paying mine. To illustrate, he pointed out that the contestees state in their patent application that they have, since 1949, spent approximately $3,300 to recover about $2,500 worth of gold.

In view of the contestant's uncontradicted evidence, the Hearing Examiner held that it had established a prima facie case in support of its' charge. As the contestees submitted no evidence to sustain their assertion of discovery, the Hearing Examiner rejected their patent application and declared the claims null and void.

The contestees' statement of reasons for appealing from the Hearing Examiner's decision incorporates by reference the arguments made in their answer to the contest complaint, the brief filed in response to the notice of a prehearing conference, and the motion to dismiss filed at the commencement of the hearing. The contestees do not, however, allege that the Hearing Examiner's findings with respect to discovery are in error.

The Hearing Examiner correctly held that the United States is not barred from inquiring into the validity of a mining claim at any time before patent is issued. In the case of *Union Oil Company of California v. Udall*, 289 F. 2d 790 (1961), the Union Oil Company argued that it acquired equitable title to certain placer mining claims when it paid the purchase price to the Bureau of Land Management and received a final receipt, citing, among others, the case of *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U.S. 428 (1892), a case cited by the contestees in connection with their motion to dismiss the contest complaint. The Court held, however, that, even if it is assumed for the sake of argument that equitable title did pass to the Union Oil Company, until legal title has passed to the applicant for a patent, "the Secretary /of the Interior/ may require further inquiry into the validity of claimed rights to public land." As authority for this proposition it cited the cases of *Cameron v. United States*, 252 U.S. 450 (1920; *Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589 (1897); *Orchard v. Alexander*, 157 U.S. 372 (1895); *Ickes v. Underwood*, 141 F. 2d 546 (1944).

It is the contestees' opinion that the Hearing Examiners who preside over hearings held in connection with contests of mining claims "have not been appointed under nor are they acting within the provisions of the Administrative Procedure Act * * * in particular provisions of Sec. 5(c) of said Act * * *."[3] In this connection, the contestees assert that the Hearing Examiner purporting to act in this case is without legal authority for the reason that "notwithstanding that functions vested in Hearing Examiners employed by the Department of the Interior were not included in the transfer of functions made by the 1950 Reorganization Plan No. 3, Sec. 1, effective May 24, 1950, there were no Hearing Examiners appointed until after September 28, 1956."

The objections stated in the above paragraph are without merit. The Administrative Procedure Act provides that, "Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8 * * *." Emphasis supplied.) The legislative history of the act clearly shows that although Congress intended an internal separation within the Department of the investigating and prosecuting from the adjudication functions, it did not intend the establishment of a separate administrative tribunal for conducting hearings and adjudicating matters in dispute.[4]

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[3] Section 5(c) provides:

> "The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigation or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

[4] Rep. Atty. Gen. Comm. Ad. Proc. 55 (1941), S. Doc. No. 8, 77th Cong., 1st Sess. 55 (1941).

The Hearing Examiner who conducted the hearing in the instant case has been properly appointed and certified by the Civil Service Commission in accordance with the Administrative Procedure Act. He had not participated in any way in the investigation or prosecution of the case before the hearing was held, and the organization of the Department of the Interior does not make a hearing examiner subject to the Department's Solicitor or to any other person who has participated in the investigation or prosecution of this case. His independence is protected and guaranteed by the retention and promotion provisions of the Administrative Procedure Act. In short, the record shows that the hearing was held in accordance with the requirements of the Administrative Procedure Act, and that the examiner who presided at the hearing was qualified under the Act. The contestees have, on the other hand, submitted nothing to show that the contest proceedings were irregular or that the Hearing Examiner was either unqualified or biased. Cf. United States v. Keith V. O'Leary et al., 66 I.D. 17 (1959).

The objection to the "intervention" by the Forest Service, and to the fact that the counsel for the United States was a representative of the Forest Service, is not well founded. The regulation 43 CFR 205.2 provides:

> "In no claim, mineral or non-mineral, shall patent issue for land within a national forest until the Bureau of Land Management is notified by, or ascertains from, the Forest Service, that the claim will not be contested. A claim may be contested by the Forest Service at any time prior to the issuance of patent or confirmation of the entry."

The regulations also provide that the Regional Attorney, Office of the Solicitor, Department of Agriculture, will appear on behalf of the Government and conduct the Government's side of the case. 43 CFR 205.9. (For the regulations concerning the procedure on applications or proof for lands within a national forest see 43 CFR 205.1 to 205.10.)

Accordingly, the Hearing Examiner's decision is affirmed.

Thor W. and Romagne E. Paulsen are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5 for each claim for which favorable action is sought. Thus, if the appeal covers both of the claims affected by this decision, the appeal filing fee will be $10. In taking an appeal there must be strict compliance with the regulations.

In the event an appeal is taken, the adverse party to be served will be:

Office of the General Counsel
U. S. Department of Agriculture
25 Taylor Street, Room 624
San Francisco, California

Assistant Director

Enclosure

DISTRIBUTION:
Gilmore and Gilmore, Agents for the contestees (Certified Mail)
Office of the General Counsel, U.S. Department of Agriculture (Regular Mail)
Mr. Charles F. Lawrence, Office of the General Counsel, U.S.D.A. (Regular Mail)
Thor W. and Romagne E. Paulsen (Regular Mail)
Office of the Hearing Examiners, Sacramento, California
Hearing Examiner Paul A. Shepard, Office of the Hearing Examiners
Hearings Administrative Assistant
SD (California)
LO (Sacramento)
Case file
Perm. file
Appeals Reading File
Attorneys Reading File
Division of Minerals (5)
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958 In reply refer to:
969 6.05c
Contest No. 5890
(California)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

January 23, 1963

Certified Mail
Return Receipt Requested

DOCKET FILES

DECISION

United States, Contestant-Appellee
v.
John Olson and Alfred Olson, Contestees-Appellants

Involving the Olson No. 1 and Olson No. 2 placer mining claims, situated in Sec. 4, T. 18 N., R. 9 E., M.D.M. Sierra County, California, and in the Tahoe National Forest.

Decision Affirmed

John and Alfred Olson have appealed from a Hearing Examiner's decision, dated July 19, 1962, rejecting their patent application for the above-identified mining claims and declaring the claims null and void for lack of discovery.

Contest proceedings were brought against the Olsons' claims by the United States, by and through the Manager of the Bureau of Land Management's Sacramento Land Office, pursuant to an official request of the Regional Forester, Forest Service, United States Department of Agriculture, California Region.[1] The contest complaint charged that a discovery of a valuable mineral deposit has not been made within the limits of any of the unpatented claims. The contestees' answer contained a general denial of the charge and a motion to dismiss the complaint for the reason that neither the Bureau of Land Management nor the Department of the Interior has jurisdiction to initiate the contest. The motion states, in essence, that the contestees are the equitable owners of the claims because they have paid to the Bureau the purchase price of the claims and have been issued an official receipt for the money, which money is still in the possession of the Bureau.

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[1] The Hearing Examiner begins his decision with the statement "The United States Forest Service, Department of Agriculture, initiated adverse proceedings against the mining claims * * *." This statement is inaccurate. As the contest complaint states, the contest was initiated by the United States, by and through the Manager of the Land Office, pursuant to a request of the Forest Service.

In a decision dated January 16, 1962, the Hearing Examiner denied the contestees' motion to dismiss, holding that the Department of the Interior can inquire into the validity of a mining claim until a patent is issued, at which time the legal title to the claim passes to the patentee.

On April 2, 1962, the Hearing Examiner issued a Notice in which he directed the contestees and three other mining claimants to appear at a prehearing conference. The contestees did not, however, participate in the conference. Instead, they filed a brief in which they listed their objections to the proceedings. In the brief they reiterated their contention that the Department is barred from bringing the action in view of their equitable ownership of the claims. They also argued that the joinder of other parties not having a common interest in the same lands was improper,[2] and that, as no hearing date had been set, the conference was a "fishing expedition" for the benefit of the Forest Service. They contended that the Hearing Examiners presiding over such contests have not been appointed under, nor are they acting within, the provisions of the Administrative Procedure Act (60 Stat. 237; 5 U.S.C.A. 1001 et seq.). In conclusion, the contestees asserted that they would waive the Constitutional rights guaranteed by the Fifth Amendment if they concurred in the action of the Hearing Examiner, and that there is no authority for an attorney for the Department of Agriculture to appear on behalf of the Bureau of Land Management in any hearing or prehearing conference.

The contestees were subsequently notified that a hearing would be held on June 14, 1962. Although not personally present at the hearing, the contestees were represented by their attorney who at the commencement of the hearing filed a brief entitled "Exceptions to Jurisdiction and Motion to Dismiss" which states that the contest must be dismissed because the Bureau of Land Management was not represented by counsel, and because the contest was initiated and is being maintained by the Forest Service, which has no authority to interfere with the application for patent. When this motion was denied by the Hearing Examiner, the agent withdrew from the proceedings and left the hearing room.

Mr. Minter E. Harris, a mining engineer for the Forest Service, was called as the contestant's witness. After qualifying himself as an expert in his field, he testified, in essence, that he had examined the claims on several occasions, at least once with one of the claimants (T. 10), and that it was his opinion that a prudent man would not be justified in investing further time and money in an effort to develop paying mines.

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[2] The joinder of the contestees with other parties listed in the Notice, Thor and Romagne Paulsen, and Patricia Lemoge Hudelson, was prompted, no doubt, by the fact that these claimants had retained the same agents, the firm of Gilmore and Gilmore, to represent them in contest proceedings which were then pending against their claims. In each case, Contest Nos. 5889, 5890, and 5891, the agents sent identical letters, dated March 23, 1962, to advise the Hearing Examiner that the claimants would not be able to appear at the prehearing conference.

In his decision of July 19, 1962, the Hearing Examiner held that the contestant had established a prima facie case in support of its charge of lack of discovery and declared the mining claims null and void, rejecting at the same time the contestees' application for patent.

In their statement of reasons for appeal, the contestees incorporate by reference the arguments made in their answer to the contest complaint, the brief filed in response to the notice of prehearing conference, and the motion to dismiss filed at the commencement of the hearing. They have also made certain assertions concerning the physical condition of the lands embraced by the claims. However, section 7(d) of the Administrative Procedure Act provides that the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision. See also 43 CFR 221.99. The assertions made by the contestees in their statement of reasons are not part of the contest record as complied at the hearing, and cannot be considered to rebut the testimony offered and received at the hearing.

The Hearing Examiner correctly held that the United States is not barred from inquiring into the validity of a mining claim at any time before patent is issued. In the case of Union Oil Company of California v. Udall, 289 F. 2d 790 (1961), the Union Oil Company argued that it acquired equitable title to certain placer mining claims when it paid the purchase price to the Bureau of Land Management and received a final receipt, citing, among others, the case of Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428 (1892), a case cited by the contestees in connection with their motion to dismiss the contest complaint. The Court held, however, that, even if it is assumed for the sake of argument that equitable title did pass to the Union Oil Company, until legal title has passed to the applicant for a patent, "the Secretary /of the Interior/ may require further inquiry into the validity of claimed rights to public land." As authority for this proposition it cited the cases of Cameron v. United States, 252 U.S. 450 (1920); Michigan Land & Lumber Co. v. Rust, 168 U.S. 589 (1897); Orchard v. Alexander, 157 U.S. 372 (1895); Ickes v. Underwood, 141 F. 2d 546 (1944).

It is the contestees' opinion that the Hearing Examiners who preside over hearings held in connection with contests of mining claims "have not been appointed under nor are they acting within the provisions of the Administrative Procedure Act * * * in particular provisions of Sec. 5(c) of said

Act * * *."[3] In this connection, the contestees assert that the Hearing Examiner purporting to act in this case is without legal authority for the reason that "notwithstanding that functions vested in Hearing Examiners employed by the Department of the Interior were not included in the transfer of functions made by the 1950 Reorganization Plan No. 3 Sec. 1, effective May 24, 1950, there were no Hearing Examiners appointed until after September 28, 1956."

The objections stated in the above paragraph are without merit. The Administrative Procedure Act provides that, "Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8 * * *." (Emphasis supplied.) The legislative history of the act clearly shows that although Congress intended an internal separation within the Department of the investigating and prosecuting from the adjudication functions, it did not intend the establishment of a separate administrative tribunal for conducting hearings and adjudicating matters in dispute.[4]

The Hearing Examiner who conducted the hearing in the instant case has been properly appointed and certified by the Civil Service Commission in accordance with the Administrative Procedure Act. He had not participated in any way in the investigation or prosecution of the case before the hearing was held, and the organization of the Department of the Interior does not make a hearing examiner subject to the Department's Solicitor or to any other person who has participated in the investigation or prosecution of this case. His independence is protected and guaranteed by the retention and promotion provisions of the Administrative Procedure Act. In short, the record shows that the hearing was held in accordance with the requirements of the Administrative Procedure Act, and that the examiner who presided at the hearing was qualified under the act. The contestees have, on the other hand, submitted nothing to show that the contest proceedings were irregular or that the Hearing Examiner was either unqualified or biased. Cf. United States v. Keith V. O'Leary et al., 66 I.D. 17 (1959).

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[3] Section 5(c) provides:

> "The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; not shall it be applicable in any manner to other agency or any member or members of the body comprising the agency."

[4] Rep. Atty. Gen. Comm. Ad. Proc. 55 (1941), S. Doc. No. 8, 77th Cong., 1st Sess. 55 (1941).

The contestees' objection to the "intervention" by the Forest Service, and to the fact that counsel for the United States was a representative of the Forest Service, is not well founded. The regulation 43 CFR 205.2 provides:

> "In no claim, mineral or nonmineral, shall patent issue for land within a national forest until the Bureau of Land Management is notified by, or ascertains from, the Forest Service, that the claim will not be contested. A claim may be contested by the Forest Service at any time prior to the issuance of patent or confirmation of the entry."

The regulations also provide that the Regional Attorney, Office of the Solicitor, Department of Agriculture, will appear on behalf of the Government and conduct the Government's side of the case. 43 CFR 205.9. (For the regulations concerning the procedure on applications or proof for lands within a national forest see 43 CFR 205.1 to 205.10.)

Accordingly, the decision of the Hearing Examiner is affirmed.

John and Alfred Olson are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken, the amount of the filing fee will be $5 for each claim for which favorable action is sought. Thus, if the appeal covers both of the claims included in this decision, the total filing fee will be $10. In taking an appeal there must be strict compliance with the regulations.

In the event an appeal is taken, the adverse party to be served will be:

Office of the General Counsel
U. S. Department of Agriculture
25 Taylor Street, Room 624
San Francisco, California

L. T. Hoffman

Assistant Director

Enclosure

DISTRIBUTION

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Office of the General Counsel, U. S. Department of Agriculture (Regular Mail)
Mr. Charles F. Lawrence (Regular Mail)
Messrs. John and Alfred Olson (Regular Mail)
Office of the Hearing Examiners, Sacramento
Hearing Examiner Shepard
Administrative Assistant, Hearings
Division of Minerals (5)
SD (California)
LO (Sacramento)
Case File
Permanent File
Appeals Reading File
Attorney's Reading File
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BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
6.05c
File in Contest No. 5889
(California)

February 7, 1963

CERTIFIED MAIL
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DECISION

United States, Contestant-Appellee, v. Patricia Lemoge Hudelson, Contestee-Appellant	Involving the Magdalena, Colima, Nogales, Morelos, Guerrero, Chiapas, Hermosillo, Ixtlan, Guaymas, Ameca, Florence, Estansuella, Guadalajara, Oaxaca, Phoenix Nos. 9, 10, 11, and Santa Elena placer mining claims, situated in T. 22 N., R. 9 E., M.D.M., Plumas County, California

Decision Affirmed

Mrs. Patricia Lemoge Hudelson has appealed from a Hearing Examiner's decision, dated July 6, 1962, rejecting her patent application for the above-identified mining claims and declaring the claims null and void for lack of discovery.

Contest proceedings were brought against Mrs. Hudelson's claims by the United States, by and through the Manager of the Bureau of Land Management's Sacramento Land Office, pursuant to an official request of the Regional Forester, Forest Service, United States Department of Agriculture, California Region.[1] The contest complaint charged that a discovery of a valuable mineral deposit has not been made within the limits of any of the unpatented claims, and that the land included within the limits of the claims is non-mineral in character within the meaning of the mining laws. The contestant's answer contained a general denial of the charges and a motion to dismiss the complaint for the reason that neither the Bureau of Land Management nor the Department of the Interior has jurisdiction to initiate the contest. The motion states, in essence, that the contestee is the equitable owner of the claims because she has paid to the Bureau the purchase price of the claims and has been issued an official receipt for the money, which money is still in the possession of the Bureau.

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[1] The Hearing Examiner begins his decision with the statement "The United States Forest Service, Department of Agriculture, initiated adverse proceedings against the mining claims * * *." This statement is inaccurate. As the contest complaint states, contest was initiated by the United States, by and through the Manager of the Land Office pursuant to a request of the Forest Service.

In a decision January 16, 1962, the Hearing Examiner denied the contestee's motion to dismiss, holding that the Department of the Interior can inquire into the validity of a mining claim until a patent is issued, at which time the legal title to the claim passes to the patentee.

On March 8, 1962, the Hearing Examiner issued a Notice in which he directed the contestee and four other mining claimants to appear at a prehearing conference. The contestee did not, however, participate in the conference. Instead, she filed a brief in which she listed her objections to the proceedings. In the brief, she reiterated her contention that the Department is barred from bringing the action in view of her equitable ownership of the claims. She also argued that the joinder of other parties not having a common interest in the same lands was improper,[2] and that, as no hearing date had been set, the conference was a "fishing expedition" for the benefit of the Forest Service. She contended that the Hearing Examiners presiding over such contests have not been appointed under, nor are they acting within, the provisions of the Administrative Procedure Act (60 Stat. 237; 5 U.S.C.A. 1001 *et seq*.). In conclusion, the contestee asserted that she would waive the Constitutional rights guaranteed by the Fifth Amendment if she concurred in the action of the Hearing Examiner, and that there is no authority for the Department of Agriculture to appear on behalf of the Bureau of Land Management in any hearing or prehearing conference.

The contestee was subsequently notified that a hearing would be held on June 12, 1962. Although not personally present at the hearing, the contestee was represented by her attorney who, at the commencement of the hearing, filed a brief entitled "Exceptions to Jurisdiction" which states that the contest must be dismised because the Bureau has no jurisdiction over the matter, because the Bureau of Land Management was not represented by counsel, and because the contest was being maintained by the Forest Service for the use and benefit of the Oroville-Wyandotte Irrigation District of California, a private agency. When this motion was denied by the Hearing Examiner, the attorney withdrew from the proceedings and left the hearing room.

The contestant called as its' witness Mr. William L. Johnson, a mining engineer for the Forest Service, United States Department of Agriculture, who, after qualifying himself as an expert in his field, testified, in substance, that he had examined all of the contested claims. He stated that it was his opinion that a prudent man would not be justified in investing time and money in an effort to develop paying mines.

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[2] The joinder of the contestee with other parties listed in the Notice, John and Alfred Olson and Thor and Romagne Paulsen, was prompted, no doubt, by the fact that these claimants had retained the same attorneys, the firm of Gilmore and Gilmore, to represent them in contest proceedings which were then pending against their claims. In each case, Contest Nos. 5889, 5890, and 5891, the attorneys sent identical letters, dated March 23, 1962, to advise the Hearing Examiner that the claimants would not be able to appear at the prehearing conference.

In his decision of July 6, the Hearing Examiner held that the contestant had established a prima facie case in support of its charge of lack of discovery and declared the mining claims null and void, rejecting at the same time the contestee's patent application.

The contestee's statement of reasons for appealling from the Hearing Examiner's decision incorporates by reference the arguments made in her answer to the contest complaint, the brief filed in response to the notice of a prehearing conference, and the motion to dismiss filed at the commencement of the hearing. She does not contend, however, that the findings of the Hearing Examiner with respect to discovery are incorrect. 3/

The Hearing Examiner correctly held that the United States is not barred from inquiring into the validity of a mining claim at any time before patent is issued. In the case of Union Oil Company of California v. Udall, 289 F. 2d 790 (1961), the Union Oil Company argued that it acquired equitable title to certain placer mining claims when it paid the purchase price to the Bureau of Land Management and received a final receipt, citing, among others, the case of Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428 (1892), a case cited by the contestees in connection with their motion to dismiss the contest complaint. The Court held, however, that, even if it is assumed for the sake of argument that equitable title did pass to the Union Oil Company, until legal title has passed to the applicant for a patent, "the Secretary /of the Interior/ may require further inquiry into the validity of claimed rights to public land." As authority for this proposition it cited the cases of Cameron v. United States, 252 U.S. 450 (1920); Michigan Land & Lumber Co. v. Rust, 168 U.S. 589 (1897); Orchard v. Alexander, 157 U.S. 372 (1895); Ickes v. Underwood, 141 F. 2d 546 (1944).

It is the contestee's opinion that the Hearing Examiners who preside over hearings held in connection with contests of mining claims "have not been appointed under nor are they acting within the provisions of the Administrative Procedure Act * * * in particular

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3/ Nevertheless, the record has been reviewed and we find that it fully supports the finding concerning discovery.

provisions of Sec. 5(c) of said Act * * *." 4/ In this connection, the contestees assert that the Hearing Examiner purporting to act in this case is without legal authority for the reason that "notwithstanding that functions vested in Hearing Examiners employed by the Department of the Interior were not included in the transfer of functions made by the 1950 Reorganization Plan No. 3 Sec. 1, effective May 24, 1950, there were no Hearing Examiners appointed until after September 28, 1956."

The objections stated in the above paragraph are without merit. The Administrative Procedure Act provides that, "Subject to the civil service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8 * * *." (Emphasis supplied.) The legislative history of the act clearly shows that although Congress intended an internal separation within the Department of the investigating and prosecuting from the adjudication functions, it did not intend the establishment of a separate administrative tribunal for conducting hearings and adjudicating matters in dispute. 5/

4/ Section 5(c) provides:

> "The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

5/ Rep. Atty. Gen. Comm. Ad. Proc. 55 (1941), S. Doc. No. 8, 77th Cong., 1st Sess. 55 (1941).

The Hearing Examiner who conducted the hearing in the instant case has been properly appointed and certified by the Civil Service Commission in accordance with the Administrative Procedure Act. He had not participated in any way in the investigation or prosecution of the case before the hearing was held, and the organization of the Department of the Interior does not make a hearing examiner subject to the Department's Solicitor or to any other person who has participated in the investigation or prosecution of this case. His independence is protected and guaranteed by the retention and promotion provisions of the Administrative Procedure Act. In short, the record shows that the hearing was held in accordance with the requirements of the Administrative Procedure Act, and that the examiner who presided at the hearing was qualified under the act. The contestees have, on the other hand, submitted nothing to show that the contest proceedings were irregular or that the Hearing Examiner was either unqualified or biased. Cf. United States v. Keith V. O'Leary et al., 66 I.D. 17 (1959).

The objection to the "intervention" by the Forest Service, and to the fact that the counsel for the United States was a representative of the Forest Service, is not well founded. The regulation 43 CFR 205.2 provides:

> "In no claim, mineral or non-mineral, shall patent issue for land within a national forest until the Bureau of Land Management is notified by, or ascertains from, the Forest Service, that the claim will not be contested. A claim may be contested by the Forest Service at any time prior to the issuance of patent or confirmation of the entry."

The regulations also provide that the Regional Attorney, Office of the Solicitor, Department of Agriculture, will appear on behalf of the Government and conduct the Government's side of the case. 43 CFR 205.9. (For the regulations concerning the procedure on applications or proof for lands within a national forest see 43 CFR 205.1 to 205.10.)

In the various briefs she has submitted during the course of this contest, the contestee has asserted that the contest was brought for the benefit of the Oroville-Wyandotte Irrigation District, a public corporation, and not for the benefit of the United States, in order to save the Irrigation District the costs and expenses of proceedings in eminent domain. In her statement of reasons for appeal, she states that this assertion has not been attacked or refuted, and that the silence of the Forest Service on this charge establishes its truth.

We find this assertion to be without merit. We find nothing in the record to support this charge, and it is fundamental that the proponent of such a charge assumes the burden of proving its validity. The Forest Service was not obligated to submit affirmative evidence to disprove the contestee's self-serving declarations.

Accordingly, the decision of the Hearing Examiner is affirmed.

Mrs. Patricia Lemoge Hudelson is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5 for each mining claim for which favorable action is sought. Thus, if the appeal covers all of the claims included in this decision, the total filing fee will be $90. In taking an appeal there must be strict compliance with the regulations.

In the event an appeal is taken, the adverse party to be served will be:

Office of the General Counsel
U. S. Department of Agriculture
25 Taylor Street, Room 624
San Francisco, California

Assistant Director

Enclosure

DISTRIBUTION:
Gilmore and Gilmore, Attys. for the contestee (Certified Mail)
Office of the General Counsel, U.S. Department of Agriculture (Regular Mail)
Mr. Charles F. Lawrence, Office of the General Counsel, U.S.D.A. (Regular Mail)
Mrs. Patricia Lemoge Hudelson
Office of the Hearing Examiners, Sacramento
Hearing Examiner Shepard, Office of the Hearing Examiners
Hearings Administrative Assistant
Division of Minerals (5)
SD (California)
LO (Sacramento)
Case File; Perm. File
Appeals Reading File
Attorneys' Reading File
LLM

IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.

6.05c
Sacramento
Contest No.
5852 2/

File in

SACRAMENTO CALIF.
FEB 25 1963
A.M. 7 8 9 10 11 12 1 2 3 4 5 6 P.M.

FEB 19 1963

Certified Mail
Return Receipt Requested

DECISION

Mr. M. L. Wisner
Mrs. Mable D. Wisner

:
:
:

Appeal From Decision of
August 7, 1962
Notice of Appeal Filed
September 7, 1962

Appeal Dismissed

For the reason listed below your appeal to the Director, Bureau of Land Management, is hereby summarily dismissed (43 CFR 221.98):

☐ No statement of reasons has been filed in support of the appeal, and the time for filing the statement has expired (43 CFR 221.3).

☐ Your statement of reasons for your appeal (or your request for extension of time to file a statement of reasons) was filed in this office, but it was filed late. (43 CFR 221.3). The statement of reasons was transmitted to this office after expiration of the period allowed, and the delay in filing cannot be waived. (43 CFR 221.92(b)).

☒ You have not served the adverse party named in the decision appealed from with a copy of ☒ the notice of appeal, and/or ☒ the statement of reasons for the appeal, in the manner prescribed in 43 CFR 221.95. (43 CFR 221.4).

☐ Your appeal does not point out wherein the decision appealed from is believed to be in error and consequently you have failed to state reasons for the appeal, as required by the rules of practice. See Duncan Miller, 65 I.D. 292.

The dismissal of an appeal for failure to comply with the above requirements is mandatory. We have enclosed Form 4-1364 which contains the cited regulations.

You are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in enclosed Form 4-1365. 1/ If you do not appeal we will close the case and return the record to our State Director for further appropriate action. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington 25, D. C. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

John B. Piccolo

Chief, Branch of Mining and Grazing Appeals
Division of Appeals

cc:
SD (California)
LO (Sacramento)

Enclosures 2

1/ The adverse party to be served is: Regional Attorney, U. S. Department of Agriculture, 25 Taylor Street-Room 624, San Francisco 2, California.

2/ Involving the Rare Earth Placer Mining Claim, situated in Secs. 12 and 13, T. 6 S., R. 21 E., M.D.M., California, and in the Sierra National Forest.

of such a charge assumes the burden of proving its validity. The Forest Se[illegible] obliga[illegible]t affirmative evidence to [illegible]s self-serving declarations.

Accordingly, the decision of the Hearing Examiner is affirmed.

Mrs. Patricia Lemoge Hudelson is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5 for each mining claim for which favorable action is sought. Thus, if the appeal covers all of the claims included in this decision, the total filing fee will be $30. In taking an appeal there must be strict compliance with the regulations.

In the event an appeal is taken, the adverse party to be served will be:

Office of the General Counsel
U. S. Department of Agriculture
25 Taylor Street, Room 624
San Francisco, California

Assistant Director

Enclosure

Distribution:
Gilmore and Gilmore, Attys. for the contestee (Certified Mail)
Office of the General Counsel, U.S. Department of Agriculture (Regular Mail)
Mr. Charles F. Lawrence, Office of the General Counsel, U.S. [illegible] Mail)
Mrs. Patricia Lemoge Hudelson
Office of the Hearing Examiners, Sacramento
Hearing Examiner Shepard, Office of the Hearing Examiners
Hearings Administrative Assistant
Division of Minerals (5)
SD (California)
LO (Sacramento)
Case File, [illegible] File
Appeals Reading File
Attorneys' Reading File
LIM

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APR 29 1963
SACRAMENTO
LAND OFFICE

In reply refer to:
6.05c
Riverside 01041

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

April 4, 1963

Route		Initial	D
	SD		
	ASD		
	T & S		
	ADMN		
	R&F		
/	L&M	BSC 4/23	
	ENGR		
	SR		
	LO(Sac)		
	C-4		

NECS. ACTION
RETURN TO

cc to each
DO + LO

DECISION

Charles J. Roycroft and
Eleanor Gibson

Babe Placer Mining Claim
located in the S½NE¼ sec.
26, T. 11 N., R. 8 W.,
California SBM.

Decision Vacated

The above named appellants have appealed to the Director from the decision of the Chief, Mineral Adjudication Unit, Riverside Land Office, dated June 15, 1962, declaring the Babe Placer mining claim null and void and rejecting the above-identified mineral patent application for the claim. The action was taken for the stated reason that Mr. Roycroft's amended notice of location (which is the only notice of location that describes the land sought for patent) was executed after the land had been classified for small tract disposition.

The pertinent facts are these: The mining claimants' original notice of location for the Babe placer mining claim, apparently in error, described the claim as being located on other land[1] than the above described land now sought for mineral patent. By an amended notice of location, dated January 21, 1961, Mr. Roycroft stated that the Babe placer mining claim is located upon the land now sought for mineral patent, that the original discovery was made on March 15, 1960, and that this notice is amendatory to the mentioned original notice of location. However, the land has been classified for small tract disposition pursuant to Classification Order No. 627, 60 F.R. 5712, effective June 14, 1960. The Classification Order provides that the land is segregated from all appropriation, including locations under the mining laws, except as to applications under the mineral leasing laws.

BSC

Route		Initial	Date
	MGR	WE	4/29
1	OPER		4/29
2	LANDS		5/29
3	MIN		
6	DOCKET		
5	INFO		6/5
	TITLE A.		
	ACCTS.		
4	Dick L.	RL	6-3

NECS. ACTION (4)
RETURN TO Docket

Please discuss
at training meet.

Lands classified as suitable for disposition under the Small Tract Act are segregated from appropriation under the mining laws, and mining claims located on land previously classified as suitable for disposition as small tracts are invalid. See Las Vegas Sand and Gravel Co., Inc., 67 I.D. 259 (1960). Thus, to obtain patent, the mining claimants must show that any rights acquired in the land were acquired prior to the effective date of the Small Tract Classification Order.

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[1] The original notice of location stated that the mining claim is located upon the S½NW¼ of the same sec. 26, which is land for which a patent without a mineral reservation, except sodium and fissionable material products, had issued to Mr. Roycroft on December 29, 1960.

Although the original notice of location cannot be shown to relate to the land applied for, and the attempted amended location is for land segregated from disposition under the general mining laws, nevertheless the mining claim cannot be declared null and void merely on the basis of the location notices. Under Federal law there is no requirement that a notice of location must be recorded. See D. L. Atherley v. Bullion Monarch Uranium Company, Inc., 335 P(2d) 71, 73; 8 Utah (2d) 362 (1959). A right in a mining claim is established by a series of acts including discovery of a valuable mineral deposit within the limits of the claim, marking the boundaries of the claim, posting notice on the claim, and recording the claim in the manner required by the regulations of the mining district. See Jebson et al. v. Spencer et al., 61 I.D. 161, 166-167 (1953). Failure to record a location notice of a mining claim does not render the location invalid, or work a forfeiture of the claim in the absence of intervening adverse rights under the mining laws, where the local customs or statutes do not so require. Furthermore, in a case of variance or discrepancies between the location notice and the stakes and monuments on the ground, the latter prevail and are more certain evidence of the exact situs of the claim. See Southern Pacific Railroad Company, 50 L.D. 577, 578-579 (1924).

It is true that the present California Statute (Pub. Res. C. A. sec. 2313), and prior statutes, provide that after posting notice of location upon a claim, the locator shall record a true story of the notice together with a statement of the markings of the boundaries. However, the California courts have held that notwithstanding a locator's failure to record his location notice, he may acquire a right of possession. See Dripps v. Allison's Mines Company, 187 P. 448; 45 Calif. App. 95 (1919). The purpose of the California recording statute is merely to give notice of the appropriation to others seeking to locate upon the same lands, and to show a compliance with the mining laws and customs. See Neet v. Holmes, 154 P.(2d) 854; 25 Calif. (2d) 447 (1944). Thus, a mining claim located on land in the State of California is not null and void merely because the mining claimant failed to record a proper notice of location for the claim.

For the reasons shown, the decision of the Chief, Mineral Adjudication Unit, is hereby vacated. The appellant's mineral patent application is returned to the Land Office at Riverside, California, through the Bureau's State Director for California, for appropriate consideration.

John B. Ciccolo

Chief, Branch of Mining and
Grazing Appeals
Division of Appeals

DISTRIBUTION:
Hon. Harlan Hagen, House of Representatives (Regular Mail)
Mr. Grover Johnson, Attorney for appellants (Regular Mail)
Mr. Charles J. Roycroft (Regular Mail)
Mrs. Eleanor Gibson (Regular Mail)
SD (California) w/case file
LO (Riverside)
Case File
Division of Minerals (4)
Attorneys' Reading File
Appeals Reading File
Perm. File
JHO'D

appeal to Sec

~~Affirmed A-29998 8-14-63~~

" A-30098 8-18-64

RECEIVED
APR 15 1963
SACRAMENTO LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

In reply refer to:
6.05c
Sacramento Contest No. 5856

April 4, 1963

Certified Mail
Return Receipt Requested

DOCKET FILES

DECISION

United States,
Contestant-Appellee,

v.

C. M. Keyes,
Carl V. Schiefer, and
Elizabeth Schiefer,
Contestees-Appellants.

Involving the Zircon Springs placer mining claim, situated in Secs. 12 and 13, T. 6 S., R. 21 E., M.D.M., Madera County, California, in the Sierra National Forest.

Decision Affirmed

The above-named contestees have appealed from a Hearing Examiner's decision, dated August 7, 1962, which declared null and void the above-identified placer mining claim. The Hearing Examiner held that a discovery of a valuable mineral deposit has not been made within the limits of the claim and that the land embraced by the claim is nonmineral in character.

The contestees allege (1) that the Hearing Examiner erred fatally in receiving in evidence certain assay reports, and expert opinion based on these reports, because they were not given the opportunity of examining the laboratory technicians who conducted the tests reflected by the assay reports; (2) that the testimony of the contestant's expert witnesses established that there is a locatable mineral on the claim, and that as long as there are minerals of economic significance on the claim that a valid location of a mining claim may be held as an unpatented claim, and (3) that the United States should be estopped to deny their right to the claim as it clothed their predecessor in interest with the indicia of ownership of the claim, which he has sold to third persons with the full knowledge of the United States.

In the absence of a statutory requirement that they be observed, the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies. Opp Cotton Mills v. Administrator, 312 U.S. 126, 155 (1941). Thus, as there is no statutory requirement involved in the instant case, the receipt of hearsay evidence is no cause for a reversal of the Hearing Examiner's decision if it is supported by reliable, substantial evidence. Cf. Willapoint Oysters v. Ewing, 174 F. 2d 676, 690 (1949). We have thoroughly reviewed the record and find that the Hearing Examiner's decision is so supported. The contestee's first allegation of error is, therefore, without merit.

We do not agree with the contestees second allegation of error. A valid claim to public land under the mining laws of the United States is predicated upon the discovery of a valuable mineral deposit. Prior to the time of discovery, a mining claimant is a mere licensee or tenant at will of the United States, Union Oil Co. v. Smith, 249 U.S. 337, 346 et seq (1919). In this connection, a "discovery" has been defined as the finding of minerals within the limits of a mining claim which would justify a man of ordinary prudence, not necessarily a miner, in undertaking an endeavor which promises a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894); Chrisman v. Miller, 197 U.S. 313 (1905). A valuable mine need not be a profitable mine, but the evidence of value which sustains a discovery must be such that, with actual mining operations under proper management, a profitable venture may reasonably be expected to result. United States v. Santiam Copper Mines, Inc., A-28272 (June 27, 1960). Hence, the discovery, to satisfy the requirements of the law, must be more than a showing only of isolated bits of mineral, not connected with or leading to substantial values. United States v. Frank J. Miller, 59 I.D. 446 (1947).

In the instant case, the uncontroverted testimony of the contestant's expert witnesses sufficiently shows that a prudent person would not be justified in expending further time and money with a reasonable prospect of success in developing a valuable mine on the basis of the mineralization exposed on the contested claim.

The contestees' third allegation of error is similarly without merit. The Secretary of the Interior, acting through his subordinates, can inquire into the validity of a mining claim until a patent is issued, at which time the legal title to the claim passes to the patentee. Cameron v. United States, 252 U.S. 450, 460 (1920). In line with this ruling, it has been the established procedure of the Department, where it is thought that a valid discovery has not been made on a claim, to institute adverse proceedings against the claim and to hold a hearing for the purpose of receiving evidence on the issue. The Dredge Corporation, 65 I.D. 336 (1958). Upon the basis of such evidence, a determination is made as to whether or not a discovery has been made. If it is determined that a valid discovery has not been made, the mining claim is declared invalid, or null and void. United States v. Carlile, 67 I.D. 417 (1960). On the other hand, the contestees have submitted no authority for their proposition that, under the circumstances of this case, the United States is estopped to deny their right to the land embraced by the claim.

Accordingly, the decision of the Hearing Examiner is affirmed.

The contestees are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington 25, D. C. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellants will have the burden of proving wherein this decision is erroneous.

In the event an appeal is taken the adverse party to be served will be:

Regional Attorney
U.S. Department of Agriculture
25 Taylor Street
Room 624
San Francisco, California

L. T. Hoffman
Assistant Director

Enclosure

DISTRIBUTION:
Mr. Donald F. Manfredo, Attorney for the contestees (Certified Mail)
Regional Attorney, U.S. Department of Agriculture (Regular Mail)
Mr. C. M. Keyes (Regular Mail)
Mr. Carl V. Schiefer (Regular Mail)
Mrs. Elizabeth Schiefer (Regular Mail)
Division of Minerals (4)
Office of the Hearing Examiners (Sacramento, California)
Mr. John Sieker, Division of Recreation & Land Uses, Forest Service, U.S. Department of Agriculture (Regular Mail)
Mr. Rawleigh Tremaine, Office of the General Counsel, U.S.D.A. (Regular Mail)
SD (California)
LO (Sacramento)
Case File; Perm. File
Administrative Assistant, Hearings
Appeals Reading File
Attorneys' Reading File
LLM

appeal to Sec. ordered resuming
Contest Proced. A-30055 Supp 12-16-
Suspended A-30055
11-20-64

DOCKET FILES

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MAY 6 1963
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LAND OFFICE

In reply refer to:
6.05c
California Contest No.
10-747

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 24, 1963

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States,
Contestant-Appellee;

v.

Humbolt Placer Mining Company,
a Corporation, and Del de Rosier
Contestees-Appellant

Involving the Ukiah, Covelo, Humbolt, White, Tannery, Tannery #2, Jackson, Cademartori, Furnell, Last Chance, Lewis, Enough and Faurrell placer mining claims. Situated in Secs. 5, 6, and 7, T. 34 N., R. 8 W.; Secs. 1, 2 and 3, T. 34 N., R. 9 W.; Sec. 35, T. 35 N., R. 9 W.; all M.D.M., Trinity County, California.

Decision Affirmed

The above-named contestees have appealed from a decision of the Manager of the Bureau's Sacramento Land Office, dated February 7, 1963, rejecting their answer to an amended contest complaint and dismissing their motion to dismiss the complaint. The Manager held that the answer and motion to dismiss, filed January 29, 1963, are not responsive to any action pending before the Department of the Interior because the case to which they were directed was finally closed on October 11, 1960, after all proper actions had been taken.

The record shows that the amended contest complaint to which the appellants' answer was directed was served on Anthony J. Kennedy, as "attorney-in-fact and law and agent for Humbolt Placer Mining Company," on March 18, 1960; and on Del de Rosier and the Humbolt Placer Mining Company, c/o E. W. Phipps, President, on March 21, 1960. The complaint charged that certain of the placer claims were null and void for want of a discovery, that the land embraced by the claims is non-mineral in character, and that one of the claims embraced noncontiguous tracts of land. It charged that portions of certain other placer claims were nonmineral in character and should be excluded from the claims. The contestees were allowed 30 days within which to file answer to the amended contest complaint; however, they filed instead, in the District Court of the United States, a "Complaint for Injunction" in which they requested that the Bureau of Land Management be permanently enjoined and restrained from proceeding further in this matter. This complaint for injunction was filed on April 18, 1960, and on that same day the Court issued a restraining order pendente lite, ordering, in effect, the Bureau of Land Management to withhold further action in connection with the amended contest complaint and to show cause why they should not be permanently enjoined from attacking the contestees' title to the claims.

In essence, the contestees' complaint for injunction charged that as the United States had initiated condemnation proceedings to obtain possession of the disputed claims in the District Court, the Bureau of Land Management had no jurisdiction to determine the validity of the claims in contest proceedings.

After a hearing on the contestees' complaint for injunction, the District Court found that, assuming that it had the power to enjoin further proceedings in the contest, there was no good reason for the exercise of such power, and that the United States could, through the means of condemnation proceedings, obtain immediate possession of the disputed claims and, at the same time, permit the Bureau of Land Management to initiate contest proceedings to challenge the validity of the claims. The District Court dissolved the temporary restraining order and dismissed the complaint for injunction. It issued no order which would keep the restraining order standing while the contestees perfected an appeal to the Court of Appeals. Humbolt Placer Mining Company and Del de Rosier v. Raymond R. Best etc., 185 F. Supp. 290 (1960).

On August 18, 1961, the Court of Appeals, 9th Circuit, vacated the ruling of the District Court and remanded the case for further proceedings. Humbolt Placer Mining Company v. Best, 293 F. 2d 553 (1961). Subsequently, the Supreme Court of the United States granted certiorari (368 U.S. 983 (1962)), and in a decision of January 14, 1963, it reversed the Circuit Court, sustaining the action taken by the District Court. Best et al., v. Humbolt Placer Mining Company et al., 371 U.S. 334 (1963).

Meanwhile, after the District Court had dissolved the restraining order and before the Circuit Court's decision, the Bureau of Land Management issued an order extending the time within which the contestees were to file an answer to the contest complaint. This order, dated July 14, 1960, stated that, as the period of time allowed to file an answer to the amended contest complaint had almost expired at the time the contestees filed their complaint for injunction and obtained a temporary restraining order, the contestees would be allowed 15 days from the date of receipt of the order within which to file an answer. The order was served on Del de Rosier on July 16, 1963, and on Claud E. Phipps and Charles L. Gilmore, attorney for the Humbolt Company, on July 18, 1963.

As the contestees did not file an answer to the amended contest complaint, the Manager issued a decision, dated August 3, 1960, declaring null and void, either in whole or in part, the claims identified in the complaint. This decision advised the contestees of the usual right of appeal to the Director, Bureau of Land Management. It was served on Mrs. C. L. Phipps on or before August 29, 1960, and on Charles L. Gilmore and Del de Rosier on August 4, 1960. No appeals were filed, however, and the Manager closed the case on October 11, 1960.

In their appeal from the Manager's February 7, 1963 decision, the contestees contend, in essence, that the Bureau of Land Management had no jurisdiction to do anything regarding the amended contest complaint from April 18, 1960, when the temporary restraining order was issued, until January 14, 1963, when the Supreme Court issued its decision.

The contestees argument overlooks Rule 62(c) of the Federal Rules of Civil Procedure and the fact that the prosecution of an appeal cannot operate as an injunction when none has been granted, as in the case of an appeal from a decree dismissing a bill for an injunction when no injunction has been granted, or from an order denying a preliminary injunction. Virginian Railway Company v. United States et al., 272 U.S. 658 (1926). An appeal from a decree granting, refusing or dissolving an injunction does not disturb its operative effect, and injunctional orders prior thereto are not set aside, kept standing or restored without a special order. Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission, 260 U.S. 212 (1922); Hovey v. McDonald, 109 U.S. 150 (1883).

Accordingly, as there is nothing in the record to show that the Courts in which this matter was prosecuted directed the Bureau of Land Management to suspend action on the amended contest complaint after the decree dissolving the temporary restraining order and dismissing the complaint for injunction had been issued, the contestees' argument is without merit.

In their appeal, the contestees state that the placer mining claims involved in this case are some of the 38 mining claims included in a single application for patent, Sacramento 049136, which was filed on November 19, 1954. They contend that they are being harassed because all of the claims included in the patent application have not been considered at one time, and that many contests involving two or more claims have been, or are being, prosecuted in a manner designed to discourage them from defending their claims.

The contestees have submitted nothing to show that all of the mining claims described in their patent application could, or should, have been examined and processed at one time so that a single contest could have determined the validity of all of the claims the United States wished to challenge. Nor are we prepared to find that this ought to have been done. That the 38 claims cover an area of some 5,645 acres, more or less, and that each of the 38 claims must be judged on its own merits, suggest that a single hearing would not be administratively feasible. Nor does the record show that the Bureau of Land Management arbitrarily delayed contesting any of the claims.

Accordingly, the decision appealed from is affirmed.

The contestees are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D.C.. The amount of the filing fee will be $5 for each mining claim for which favorable action is sought. If all 13 mining claims affected by this decision are included in an appeal, the filing fee will be $65. In taking an appeal, there must be strict compliance with the regulations. If an appeal is filed the appellants will have the burden of showing that this decision is erroneous.

John B. Ciccolo
Chief, Branch of Mining
and Grazing Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Mr. Charles L. Gilmore, Attorney for the appellants (Certified Mail)
Mr. Del de Rosier
Humbolt Placer Mining Company
Division of Minerals
Hearings Administrative Assistant
SD (California)
LO (Sacramento)
Case File
Perm. File
Appeals Reading File
Attorneys' Reading File
LLM

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DEPT. OF INTERIOR
SACRAMENTO. CAL.

JUN 7 10 00 AM 1963

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:
6.05c
Sacramento 074008

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

May 28, 1963

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Homer B. Willis : Involving the Red Cap Gulch placer mining claim. Situated in the NE$\frac{1}{4}$ Sec. 9, T. 10 N., R. 5 E., H.M., Humbolt County, California

Decision Affirmed

Mr. Homer B. Willis has appealed from a decision of the Manager, dated February 18, 1963, declaring null and void the above-identified placer mining claim. The Manager held that Mr. Willis' failure to respond to a contest complaint, charging that his claim is invalid for lack of discovery and that the land embraced by the claim is nonmineral in character, is an admission of the truth of the charges and declared the claim null and void for this reason.

The Manager's decision begins with a statement that adverse proceedings were ordered against the claim based on a field examination made by a representative of the Bureau of Land Management. In his appeal Mr. Willis states simply that he has seen no person of authority examine the claim and no evidence of any work done on it.

The record shows that the Red Cap Gulch placer mining claim was examined on July 11, 1962, by Mr. Gerald E. Gould, a mining engineer employed by the Forest Service, U.S. Department of Agriculture, who was, in this instance, also representing the Bureau of Land Management. Mr. Gould reported that his examination and sampling failed to disclose any mineral, much less a discovery of a valuable mineral deposit.

The record also shows that Mr. Willis failed to respond to the contest complaint which was served upon him on January 11, 1963, as stated by the Manager. Accordingly, as it is well settled that a mining claim is properly declared null and void where the contestee fails to file an answer denying the charges of invalidity contained in a contest complaint served upon him, the Manager's decision is affirmed. United States v. Henry Gilligan et al., A-28857 (February 19, 1962).

Mr. Willis is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D.C. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken, the appellant will have the burden of proving, by presenting substantial affirmative evidence, that this decision is erroneous.

In the event an appeal is taken from this decision, the adverse party to be served is the:

Regional Forester
Forest Service
U.S. Department of Agriculture
California Region
630 Sansome Street
San Francisco 11, California

John B. Piccolo
Chief, Branch of Mining
and Grazing Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Mr. Homer B. Willis (Certified Mail)
Regional Attorney, Office of General Counsel, U.S. Department of Agricuture
Regional Forester, Forest Service, U.S. Department of Agriculture
Office of the General Counsel, Forestry and Lands Division, U. S. Department Agriculture
Forest Service, Recreation and Land Uses, U. S. Department of Agriculture
Gower Federal Service
Division of Minerals (3)
Appeals List No. 1
LLM

appeal to Sec
dismissed A-30259
5-5-64

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DOCKET FILES

In reply refer to:
6.05c
Los Angeles Contest Nos.
6-722 and 6-723

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 4, 1963

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America,
Contestant,

v.

Grace E. Hutchins *et al.*,
Contestees.

The Treasure Mountain No. 1 and No. 2, and Imperial Lode Mining Claims, located in secs. 21, and 22, T. 30 S., R. 47 E. (unsurveyed), M.D.M., California

Appeal Dismissed; Protest Denied

Mrs. Grace E. Hutchins 1/ has appealed from the decision of the Hearing Examiner, dated April 6, 1961, 2/ declaring the above-identified lode mining claims 3/ null and void for lack of discovery.

The Hearing Examiner's decision required that in the event Mrs. Hutchins appealed to this office, the attorney for the contestant must be served in accordance with departmental regulations, 43 CFR, 221.4 and 221.95. By letter dated June 26, 1961, we requested that the appellant submit proof of service of her notice of appeal (which included her statement of reasons) upon the adverse party named in the decision appealed from. The required proof of service upon the contestant's attorney has not been received. The dismissal of an appeal for failure to serve the adverse party named in the decision is mandatory. 43 CFR, 221.98. Accordingly, the appellant's appeal is hereby summarily dismissed. See Edith H. Payne, A-28153 (February 29, 1960).

The appellant protests that her appeal was "not handled in a procedurely correct manner" because she did not receive a copy of the reporter's

---

1/ Mr. Sam Hadlock, contestee, was served by publication in Contest No. 6-722, but he did not answer the complaint or appear at the hearing, and he is not a party to this appeal. See United States v. Raymer Garnett et al., A-28545 (January 31, 1961).

2/ Action on this appeal was suspended pursuant to an Order of the United States District Court for the Southern District of California. The Order was vacated effective May 14, 1963. See Condemnation Proceedings Nos. 3129-PH, 14361-PH, 769-60-PH, Mohave "B" Gunnery Range, U.S.D.C., S.D., Calif.-Grace Martin Hutchins.

3/ The decision also held null and void the Red Rutile and Sentinel lode mining claims, situated in sec. 5, T. 30 S., R. 45 E., M.D.M., but no appeal has been taken from that part of the decision and it is now final. Garth L. Wilhelm et al., 62 I.D. 27 (1955).

transcript of the proceedings and testimony of the contest hearing. The appeal record does not show that the appellant ordered a copy of the transcript, and she was charged only for her share of the reporter's fees. Moreover, the record does not show that she requested, or was refused, an opportunity to examine the transcript in the case record. The record does not show that the appellant was denied procedural rights as alleged, so her protest is denied.

The appeal record does not show that the Hearing Examiner's decision is erroneous. The appellant shows that she and Mr. Hadlock claimed lode mining claims on the land for building stone. The Building Stone Act of August 4, 1892 (30 U.S.C., 1958 ed., 161) made lands chiefly valuable for building stone 4/ subject to the provisions of the placer mining law. See Henderson et al., v. Fulton, 35 I.D. 652 (1907). It is well settled that a placer discovery will not sustain a lode location. Layman et al. v. Ellis, 52 I.D. 714, 722 (1929).

The appellant suggests amending her lode mining claims to placer mining claims. However, the lands were withdrawn from location under the mining laws on September 2, 1943. Public land which is not open to mining location is, consequently, not open to amended mining location. Fred Orebaugh, A-28482 (November 28, 1960). The fact that the appellant had an invalid lode mining claim for the land before the withdrawal order, will not permit her to amend her claim to now assert a placer claim for the withdrawn land.

To constitute a valid discovery on a lode mining claim, there must be the discovery of a lode or vein within the boundaries of the claim. The evidence that colors of gold have been found on the land, and the appellant's assertion on appeal that valuable minerals have been discovered in the area, are not evidence of the discovery of a valuable mineral deposit within the requirements of the mining laws. See United States v. Lucetta A. Hunt et al., A-28189 (February 29, 1960). The appellant has not shown that a discovery of a lode mining claim was made on the land prior to withdrawal of the land from location.

The appellant has not shown that the decision of the Hearing Examiner holding her mining claims to be null and void is erroneous.

4/ See act of July 23, 1955, Public Law 167 (30 U.S.C., 1958 ed., 601 et seq.).

Mrs. Grace E. Hutchins is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D.C. The amount of the filing fee will be computed on the basis of $5 for each mining claim adversely affected by this decision. If the appeal seeks favorable action concerning all of the mining claims named herein the total filing fee is $15. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of showing wherein the decision appealed from is in error.

If an appeal is taken by Mrs. Hutchins, the adverse party to be served is:

Mr. Foster Buckner
Office of the Regional Solicitor
Department of the Interior
Rowan Building
458 South Spring Street
Los Angeles 13, California

L. T. Hoffman
Assistant Director

Enclosure

DISTRIBUTION:
Mr. Dale C. Miller, Attorney for Appellant (Certified Mail)
Mr. Foster Buckner, Attorney for Contestant
Regional Solicitor, Los Angeles Region (Sol's #33-5-907-5)
Mrs. Grace E. Hutchins
Mr. George F. Hurley, Assistant United States Attorney 5/
Gower Federal Service, Boulder Colorado (1)
Division of Minerals (3)
Appeals List No. 1
JHO'D

5/ Possession of the lands was taken by the United States pursuant to order entered in pending condemnation proceedings, Civil No. 3129-PH, in the United States District Court, Southern District of California.

appeal to Sec
affirmed A-30093
3-26-64

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JUN 10 1963
SACRAMENTO LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

In reply refer to:
6.05c
Sacramento PL 49-16

June 4, 1963

Certified Mail
Return Receipt Requested

DECISION

Alice A. Upton : Verified Statement (Act of July 23, 1955)

Decision Affirmed

Mrs. Upton has appealed in her own behalf and on behalf of her two sons, Harry C. and Joe M. Owen, from a decision, dated October 19, 1962, rejecting a verified statement covering the Mizpah and Gold King[1] mining claims, filed under section 5 of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 613 et seq.). The rejection was for the reason that the statement was not filed within 150 days from the first publication of Notice to Mining Claimants on October 1, 1958, that the filing of such a statement was required under the act to protect rights in surface resources on the unpatented Mizpah and Gold King mining claims.

The act of July 23, 1955, supra, provides in part that persons who made mining locations prior to the passage of the act must, when called upon to do so by a published notice assert their rights to the use of certain surface resources on their mining claims. The assertion of rights takes the form of a verified statement as prescribed by section 5 of the act (supra, sec. 613). The statement must be filed within 150 days from first publication of the notice. Failure to file the verified statement within the time allowed results in the limitations of section 4 (supra, sec. 612) being imposed upon the mining claims until patent is issued.

The record shows that a notice to mining claimants, covering the lands in Butte County, California, on which the Mizpah claim is located, requiring mining claimants to file verified statements under the act was published on October 1, 1958, at the request of the Forest Service, United States Department of Agriculture. The 150th day thereafter was February 28, 1959, a Saturday, so that the last day for timely filing a verified statement was, Monday, March 2, 1959. The Land Office rejected appellant's verified statement on the ground that it was filed in the Land Office on September 17, 1962, or more than 3½ years late.

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[1] In a letter dated November 10, 1962, addressed to the Sacramento Land Office, Mrs. Upton stated "I find I have the Gold King as the second claim--that claim--my husband held years ago at Feather River and later sold so we have no interest in it anymore." Accordingly, this decision pertains only to the Mizpah claim.

The appellant does not deny that the verified statement was filed late, but sets forth extenuating circumstances as the reason for the delay in filing and expressed a desire to retain rights to the timber on the Mizpah mining claim.

In Hines Gilbert Gold Mines Co., 65 I.D. 481 (1958), the Department pointed out that the Secretary of the Interior is given no discretion as to the time when the privilege of filing a verified statement terminates for the statute states explicitly that the period is 150 days and it itemizes with particularity the consequences of failure to file within the 150 days.

In the instant case, since the appellant's verified statement was not received in the Land Office until more than 3½ years after the last possible date for timely filing, the appellant has failed to meet the requirements of the law and the Bureau is without authority to waive the consequences.

Accordingly, the decision appealed from is affirmed.

Mrs. Upton is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D.C., and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

John B Piccolo

Chief, Branch of Mining
and Grazing Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Mrs. Alice A. Upton (Certified Mail)
Forest Service, Division of Recreation and Land Uses, U.S.D.A. (8)
Office of the General Counsel, Division of Forestry and Lands, U.S.D.A.
Division of Minerals (3)
Gower Federal Service (1)
Appeals List No. 1
WHW

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UNITED STATES **DOCKET FILES**
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Office of the Hearing Examiners
P. O. Box 21-4215
Sacramento 21, California

10-748

June 10, 1963

DECISION

United States of America,	:	Contest No. 10-748, Involving
Contestant	:	Tannery No. 3 Placer Mining Claim
	:	embraced within $N\frac{1}{2}N\frac{1}{2}$ of Lot 2, and
v.	:	Lots 3 and 4, Sec. 1, T. 34 N.,
	:	R. 9 W., M.D.M.; and Contest No.
Humboldt Placer Mining Company,	:	10-874, Involving Humboldt Placer
a Corporation; Del de Rosier;	:	Mining Claim embraced within
Heirs and Devisees of James	:	$NW\frac{1}{4}SW\frac{1}{4}NE\frac{1}{4}$ Sec. 3, T. 34 N.,
Towles, Deceased, R. M. Howard,	:	R. 9 W., M.D.M., Recorded in Book
Deceased, J. J. Condon, Deceased;	:	16, page 188, Book 30, page 474,
W. A. Stowers, Deceased; and	:	Official Records of Trinity County,
Unknown Owners	:	California
Contestees	:	

Mining Claims Declared Null and Void

The contestant initiated this proceeding by the filing of complaints in the Sacramento Land Office on May 14, and July 23, 1958. The complaints alleged in part that the land embraced within the claims is nonmineral in character, and that minerals have not been found within the claims in sufficient quantities to constitute a valid discovery. The contestees filed a timely answer in which these allegations were denied.

Thereafter a hearing was held in Sacramento, California, on May 15, 1963, to afford the parties an opportunity of presenting evidence and examining and cross-examining witnesses. At the hearing the contestant was represented by Louis F. Fox, Attorney, Office of the Regional Solicitor, Sacramento, California. There was no appearance by or on behalf of the contestees. The witnesses were Robert K. Evans, a consulting engineer, Minter E. Harris, a mining engineer employed by the Forest Service, and George O. Scarfe, Jr., a mining engineer employed by the Bureau of Land Management.

The testimony and other evidence at the hearing was that the Tannery No. 3 Placer claim was located January 1, 1901, and that the Humboldt Placer claim was located October 20, 1921. Both were located for placer gold. All of the land within the two claims was withdrawn for reclamation purposes on or before November 10, 1955 under the provisions of Section 3 of the Act of June 17, 1902 (32 Stat. 388; 43 U.S.C. 416).

CLOSED
AUG 1 - 1963

The appellant does not deny that the verified statement was filed late, but sets forth extenuating circumstances as the reason for the delay in filing and expressed a desire to retain rights to the placer of the [illegible] mining claim.

In Mines Gilbert Gold Mines Co., 65 I.D. 481 (1958), the Department pointed out that the Secretary of the Interior is given no discretion as to the time when the privilege of filing a verified statement terminates for the statute states explicitly that the period is 150 days and it specifies with particularity the consequences of failure to file within the 150 days.

In the instant case, since the appellant's verified statement was not received in the land office until more than 3½ years after the last possible date for timely filing, the appellant has failed to meet the requirement of the law and the statement is without effect to [illegible] the consequences.

Accordingly, the decision appealed from is affirmed.

Mrs. Upton is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D.C., and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving the prevailing position and [illegible] evidence, wherein the decision appealed from is in error.

[illegible]

Enclosure

DISTRIBUTION:
Mrs. Aileen A. Upton (Certified Mail)
Forest Service, Division of Recreation and Land Uses, U.S.D.A. (2)
Office of the General Counsel, Division of Forestry and Lands, U.S.D.A.
Division of Minerals (2)
Gover [illegible] Service (1)
Appeals List No. 1
WMW

In the area of both claims, the underlying substrata consists of Mississippian Bragdon formation, a highly metamorphic shale, slate and conglomerate. Over this there is a massive layer of tertiary gravel referred to as the Weaverville formation and in the streams and gulches there is a quaternary or present stream gravel. The Bragdon formation is not a host rock for placer material. The gravel in the Weaverville formation was from the ancestral Trinity River and is known to contain low grade placer gold. In some locations throughout the area millions of yards of the Weaverville gravels have been reworked by the present streams and the gold has been concentrated in minable deposits.

The Humboldt claim contains 10 acres and is a short distance north of Slate Creek. On this claim all of the gravel is part of the Weaverville formation. There are no streams or major gulches on the claim and no quaternary gravels. Samples of the Weaverville formation on and around the claim contained no measurable values.

The Tannery No. 3 is on the Stuart Fork of Trinity River approximately two miles downstream from the Humboldt claim. The south half of this claim contains the Weaverville formation and the north half contains gravel from the present stream. Samples were taken from both formations. Twenty-four of the most favorable samples were taken from gullies on the claim and the average value was 8.99 cents a cubic yard. The value of the remaining samples was less than one cent a cubic yard.

No evidence was found on the ground by the witnesses to suggest that either claim had been worked. On both claims the ground cover and gravels were undisturbed. The witnesses concluded from their examinations that there was not a valuable deposit of minerals on either claim and that the land was not valuable for its mineral content.

The mining laws reserve lands valuable for minerals but authorize the acquisition of valuable mineral deposits through the location of mining claims. The validity of such a location is dependent on the discovery of a valuable deposit within the claim (30 U.S.C. 1958 ed., secs. 21, 22, 23, and 35). In the determination of whether a deposit is valuable the Department has followed the rule in Castle v. Womble, 19 L.D. 455 (1894) wherein it is stated:

> "* * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

From the evidence presented at the hearing I find that there is insufficient minerals within the two claims to constitute a valuable mineral deposit and that the land is not valuable because of its mineral content.

Accordingly, I conclude that the Tannery No. 3 and the Humboldt Placer Mining Claims described above are null and void.

Right of Appeal

This decision becomes final 30 days from its receipt unless an appeal to the Director, Bureau of Land Management, is filed. There must be strict compliance with the regulations in 43 CFR, Part 221, as amended (see enclosed Form 4-1364). If an appeal is taken, it must be filed in the Office of the Hearing Examiners, P. O. Box 21-4215, Sacramento 21, California. The adverse party to be served with a copy of the appeal is: Office of the Regional Solicitor, U. S. Department of the Interior, P. O. Box 21-4527, Sacramento 21, California. The amount of the filing fee will be $5 for each claim appealed.

Graydon E. Holt

Graydon E. Holt
Hearing Examiner

Enclosure

Distribution

Regional Attorney, Office of the Regional Solicitor, U. S. Dept. of the Interior, Sacramento, Calif. (Cert. Mail)
Mr. Charles L. Gilmore, Attorney, 310 Mitau Building, 1005 8th Street, Sacramento 14, California (Cert. Mail)
Del de Rosier, 3555 Miami Street, Sacramento 21, California

Standard Distribution

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In reply refer to:
6.05c
Los Angeles 0168853

June 12, 1963

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

RECEIVED
JUN 19 1963
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LAND OFFICE

Certified Mail
Return Receipt Requested

DECISION

James A. Reardon
Edwin Diedrich and
John Milton Diedrich

Involving the Mary Anna Group Placer Mining Claim. Situated in what would probably be, if surveyed, the E$\frac{1}{2}$SW$\frac{1}{4}$, NW$\frac{1}{4}$SW$\frac{1}{4}$ and SW$\frac{1}{4}$NW$\frac{1}{4}$ of Sec. 34, T. 6 N., R. 18 W., S.B.M., Ventura County, California.

Decision Affirmed

The above-named parties have appealed from a decision of the Acting Manager, Riverside Land Office, dated December 31, 1962, declaring null and void in part the above-identified placer mining claim and holding their mineral patent application for rejection. The decision held that the unsurveyed NE$\frac{1}{4}$SW$\frac{1}{4}$ of Section 34 was withdrawn from mineral entry under the provisions of section 24 of the Act of June 10, 1920 (41 Stat. 1075; 16 U.S.C. 818), at the time the Mary Anna claim was purportedly located, and that the claim is therefore, null and void insofar as it is situated in that subdivision.

The Acting Manager continued that as the discovery point for the claim was not situated on withdrawn land, the claimants could, if they desired, continue to perfect their patent application for the portion of the claim embracing the discovery point. He found, however, that as the exact location and acreage of this part of the claim cannot be determined from Mineral Survey 6644, an amended mineral survey is required to properly describe the area remaining in the claim. The Acting Manager, for this reason, held the mineral patent application for rejection, stating that unless within 30 days the claimants submitted evidence that they have applied for an amended mineral survey the case would be closed without further notice. The Acting Manager also stated that, because the Mary Anna Group claim cannot be entirely included in two square 40-acre tracts placed end to end, it would be necessary for the claimants to submit evidence that their claim conforms reasonably to the legal subdivisions of the public survey.

The claimants' statement of reasons consists of three short statements in which they assert, without supporting argument, that no part of the claim has been effectively withdrawn from location, that the mineral survey accompanying the application is adequate, and that the location does reasonably conform to the legal subdivisions of the public surveys.

The record shows, as the Acting Manager stated, that the unsurveyed NE$\frac{1}{4}$SW$\frac{1}{4}$ of Section 34 was withdrawn from mineral entry when the claim was purportedly located. Hence, his decision is, in this respect, proper. Day Mines Inc., 65 I.D. 145 (1958). The record also shows that the Acting Manager properly held that a new mineral survey is required to properly describe the area remaining in the claim, and that it is necessary for the claimants to submit evidence that their claim conforms reasonably to the legal subdivisions of the public survey. The claimants have, on the other hand, submitted nothing to show that the Acting Manager erred in this respect.

Accordingly, the decision of the Acting Manager is affirmed.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D. C. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellants will have the burden of showing, by presenting substantial affirmative evidence, that this decision is erroneous.

John B. Piccolo
Chief, Branch of Mining and
Grazing Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Mr. John J. Owens, Attorney for the Appellants (Certified Mail)
Mr. James A. Reardon
Mr. Edwin Diedrich
Mr. John Milton Diedrich
Division of Minerals (3)
Gower Federal Service (1)
Appeals List No. 1
LLM

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In reply refer to:
6.05c
California Contest 6975

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 20, 1963

Certified Mail
Return Receipt Requested

United States,
Contestant-Appellee,
v.
H. C. Gibson,
Contestee-Appellant

Involving the Gibson and Special Materials, 1 through 8 Placer Mining Claim. Situated in Sec. 27, T. 13 S., R. 18 E., S.B.M., Imperial County, California.

Decision Affirmed

H. C. Gibson [1] has appealed from a Hearing Examiner's decision, dated November 9, 1962, holding null and void the above-identified placer mining claim. The Hearing Examiner held that the gravels found on the claim are of a common variety as defined by Section 3 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C. 601), and not locatable minerals since the passage of that Act.

The contestee asserts that the evidence submitted by the contestant is not sufficient to justify the Hearing Examiner's decision. A review of the record discloses, however, that this is not the case.

The contestant's expert witness, who examined the contested claim and other sand and gravel claims in the area (Tr. 12), testified that the gravel [2] found on the contested claim has no unique or special properties which would make it suitable for use other than construction or general building purposes (Tr. 14). Mr. Phillip W. Heelsley, who appeared on behalf of the contestee, testified that the deposits found on the contested claim have a special economic value because they may be used as aggregate for certain construction purposes without crushing (Tr. 46-47), but admitted that they are unique or distinct only because of their angular surfaces and that, mineralogically, they are probably very similar in composition to other deposits in the valley that are used for aggregates.

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[1] The contest complaint was addressed to H. C. Gibson and seven others. The record shows, however, that H. C. Gibson had acquired the interests of the other claimants prior to the initiation of the contest.

[2] The contestee has argued that the material found on the contested claim is not "gravel" in the usual sense of the word, and that the definition of gravel stated by the contestant's witness, that gravel "is merely fragmental rock" (Tr. 25), is not correct. It is our opinion that there is no real difference between the contestee's definition of gravel and the one expressed by Mr. Boyd. On page 3 of his statement of reasons, the contestee states that, according to "the best authority on American Mining Law" gravel has been defined as "fragments of rock worn by the action of the air and water and coarser than sand." Emphasis supplied.)

(Tr. 44-45). He also testified that the sand and gravel from the contested claim would normally be used only as a base material for highway construction, as bituminous mixture for roadway and airport surfacing and for concrete (Tr. 47-48). The contestee testified that he had used the material taken from the contested claim for no other purpose than for road construction (Tr. 54).

In view of the above-cited testimony it is clear that, while it may be economically advantageous to exploit the deposits of sand and gravel found on the contested claim because crushing would be unnecessary, the deposits are used only for the same purposes as other deposits which are readily available. Thus, they are a common variety and are not subject to location under the mining laws. United States v. J. R. Henderson, 68 I.D. 26 (1961).

The contestee further asserts that the hearing conducted in this matter violates the due process clause of the 14th Amendment. He argues that, due to the administrative structure of the Bureau of Land Management, its personnel are in contact with each other so that the Hearing Examiner will unconsciously lean toward the evidence of the contestant and the upholding of the previous decisions of the Interior Department.

The Administrative Procedure Act (60 Stat. 237; 5 U.S.C.A. 1001 *et seq.*) provides that, "Subject to the civil service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8 * * *." (Emphasis supplied.) The legislative history of the act clearly shows that although Congress intended an internal separation within the Department of the investigating and prosecuting from the adjudication functions, it did not intend the establishment of a separate administrative tribunal for conducting hearings and adjudicating matters in dispute.[3]

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[3] Rep. Atty. Gen. Comm. Ad., Proc. 55 (1941), S. Doc. No. 8, 77th Cong., 1st Sess. 55 (1941).
Section 5(c) provides:

> "The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

The Hearing Examiner who conducted the hearing in the instant case has been properly appointed and certified by the Civil Service Commission in accordance with the Administrative Procedure Act. He had not participated in any way in the investigation or prosecution of the case before the hearing was held and the organization of the Department of the Interior does not make a hearing examiner subject to the Department's Solicitor or to any other person who has participated in the investigation or prosecution of this case. His independence is protected and guaranteed by the retention and promotion provisions of the Administrative Procedure Act. In short, the record shows that the hearing was held in accordance with the requirements of the Administrative Procedure Act, and that the examiner who presided at the hearing was qualified under the Act. The contestee has on the other hand, submitted nothing to show that the contest proceedings were irregular or that the Hearing Examiner was either unqualified or biased. Cf. United States v. Kieth V. O'Leary et al., 66 I.D. 17 (1959).

In conclusion, the contestee asserts that the underlying purpose and intent of the Act of July 23, 1955, supra, is being perverted because the purpose of the Act is to prevent abuses by those who locate mining claims on public lands for purposes other than that of mining and not to discourage legitimate mining operations.

In view of the unambiguous language of so much of the Act of July 23, 1955, as is pertinent in the instant case, a discussion of the underlying legislative intent would be pointless. It should, nevertheless be noted in passing that, contrary to the contestee's last assertion, the purpose of the Act is to provide for the multiple use of the surface of lands, which includes, but is not limited to, the prevention of fraudulent mining claims.

The Act clearly states that " * * * common varieties of * * * sand * * * [and] gravel, * * * may be disposed of only in accordance with the provisions of this Act and upon the payment of adequate compensation therefor * * *," and that "a deposit of common varieties of sand, * * * gravel, * * * shall not be deemed a valuable mineral deposit within the meaning of the mining laws * * *." Therefore, as the contested mining claim has been found to consist of deposits of a common variety of sand and gravel, it cannot be disposed of under the mining laws of the United States.

Accordingly, the decision of the Hearing Examiner is affirmed.

Mr. H. C. Gibson is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D. C. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellant will have the burden of showing that this decision is erroneous.

If an appeal is taken the adverse party to be served will be:

Regional Solicitor
Department of the Interior
458 South Spring Street
Los Angeles 13, California

L T Hoffman
Assistant Director

Enclosure

DISTRIBUTION
Mr. R. B. Whitelaw, Attorney for the appellant (Certified Mail)
Mr. H. C. Gibson
Division of Minerals (3)
Gower Federal Service
Hearings Administrative Assistant
Appeals List No. 1
LLM

appeal to Sec—
affirmed A-30125
11-20-64

DOCKET FILES

PT. OF INTERIOR
CRAMENTO, CAL.

JUL 31 2 45 PM 1963

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:
6.05c
Sacramento Contest No. 5740

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 24, 1963

Certified Mail
Return Receipt Requested

DECISION

James Duguid and Bertha V. Duguid	Involving the Duguid-Clifford placer mining claim. Situated in Sec. 18, T. 23 N., R. 4 E., M.D.M., Butte County, California, a part of the Lassen National Forest.

Decision Affirmed

The above-named parties have appealed from the decision issued on April 9, 1963, by the Manager of the Sacramento, California, Land Office, declaring null and void the above-identified placer mining claim. The Manager held that, as an answer to the private contest complaint filed by the Paradise Irrigation District was not timely filed, the charges in the complaint 1/ must be taken as admitted and he declared the mining claim null and void for this reason.

The appellant contends, in essence, that, as this is a private contest, in which the United States has no interest, the Manager was without authority to take any action after the receipt of the contest complaint. They assert that the proceeding is an adjudication of the conflicting possessory interests of the contestant and the contestee, which is not within the province of the Bureau of Land Management but is a question for the proper State court. They also argue that the Manager's action violates the provisions of the Administrative Procedure Act (5 U.S.C. 1001 et seq.).

As the action taken by the Manager in the instant case is precisely that outlined for him to take under such circumstances by the Department's regulations, 43 CFR 221.51 et seq., the appellants' assertions are, in effect, a contention that these regulations have no basis in law. This contention was, however, specifically rejected by the court in the case of Duguid v. Best, 291 F. 2d 235 (1961); cert. den. 372 U.S. 906 (1963), in which case the appellants were the parties plaintiff. In that case the court stated,

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1/ The contest complaint charged (1) that the lands within the boundaries of the claim are non-mineral in character, (2) that there has been no discovery on the claim and (3) that the alleged claim is invalid and illusory, but that the contestant's right to use and enjoy the land for dam and mining reservoir purposes is valid and is not causing damage to the mining claimant in any way.

at page 242:

> "Since the purpose and end result of a private contest operate to protect the government against invalid claims of title to or interest in public lands, we are convinced that such regulation is valid. It was promulgated pursuant to Title 43 U.S.C.A. sec. 1201, supra, under the power granted to the Secretary of the Interior by the provisions of Title 5 U.S.C.A. sec. 485, supra, to carry out his duties to supervise public business relating to public lands, including mines."

The court, in Duguid v. Best, supra, also stated that the contest is not, as the appellants contend, an ajudication of the conflicting possessory interests of the contestant and the contestee. At page 241 the court observed:

> "Under Section 221.51 a person who claims title to or interest in public lands adverse to any other person claiming title to or interest in such land 'may initiate proceedings to have the claim of title or interest to his claim invalidated for any reason not shown by the records of the Bureau of Land Management.' * * * [Italics added by the court] By the express language of the regulation, a person who initiates such proceedings seeks only to have invalidated the claim of title or interest of the adversary party against the government." (Emphasis added)

The appellants contend that the action taken by the Manager violates the provisions of the Administrative Procedure Act, supra. They argue, on pages 6 and 7 of their reasons for appeal, that, under the provisions of the Act and the departmental decision United States v. Keith V. O'Leary, et al., 63 I.D. 341 (1956), the Manager is "utterly without power, authority or jurisdiction to meddle or interfere in any matter of contest involving a mining location," but that the matter should have been referred by the Manager to the Office of the Hearing Examiners of the Sacramento District.

This contention is, however, inconsistent with the court's ruling in Duguid v. Best, supra, which holds that the regulation forming the basis for the Manager's action is valid. 2/ Moreover, we find nothing in the Administrative Procedure Act or the O'Leary decision, supra, which requires the referral of a contest proceeding to a hearing examiner when it develops that there are no factual issues to be resolved. An examination of the

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2/ 43 CFR 221.65(a) reads as follows:

> "If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing."

hearings provisions of the Administrative Procedure Act 3/ demonstrates clearly that they are aimed at, and confined to, hearings for the purpose of receiving evidence on factual issues, not questions of law with the basic facts not in dispute. The Dredge Corporation, 65 I.D. 336 (1958).

Accordingly, the decision of the Manager is affirmed.

James and Bertha V. Duguid are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D. C. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

In the event an appeal is taken, the adverse party to be served will be:

Paradise Irrigation District
c/o Minasian & Minasian
Attorneys at Law
1979 Bird Street
Oroville, California

John B. Piccolo

Chief, Branch of Mining
and Grazing Appeals
Division of Appeals

Enclosure

3/ Sections 5, 7 and 8 of the Act; 5 U.S.C. 1004, 1006 and 1007.

DISTRIBUTION
Mr. Charles L. Gilmore, Attorney for appellants (Certified Mail)
Mr. James Duguid
Mrs. Bertha V. Duguid
Paradise Irrigation District
Regional Forester, Forest Service
Forest Service, Recreation and Land Uses
Division of Minerals (3)
Appeals List No. 1
LLM

appeal to Sec
A-30126 10-15-64

DOCKET FILES

EPT. OF INTERIOR
ACRAMENTO, CAL.

AUG 16 10 00 AM 1963

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:
6.05c
Sacramento Contest No.
5793
Sacramento 059459
August 12, 1963
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

DECISION

United States of America :
by the Forest Service, U.S.D.A., :
contestant-appellant, : Bokee Mill Site located in
: sec. 19, T. 1 N., R. 25 E.,
v. : M.D.M., California, within
: the Inyo National Forest
Gilbert C. Wedertz, :
contestee-patent applicant. :

Decision Vacated;
Mill Site Null and Void;
Patent Application Rejected

The above named appellant has appealed from the Hearing Examiner's decision, dated March 9, 1962, dismissing the contest against the above-identified mill site.

Mr. Wedertz purchased at a tax sale five mining claims which had been patented in the early 1880's (Tr. 22, 23), then he relocated the nearby Bokee mill site. When he acquired the mining claims, he also purchased the remainder of two old cabins on the mill site. On December 22, 1959, Mr. Wedertz filed an amended application 1/ for patent to the subject mill site (Sacramento 059459). Thereupon, the Forest Service initiated these contest proceedings.

1/ Mr. Wedertz by his original application sought patent to the Bokee and Swift mill sites. The Chief, Minerals Adjudication Unit, Sacramento Land Office, rendered a decision, dated December 3, 1959, stating that only one 5-acre mill site may be patented for a group of contiguous lode claims. Thereupon, Mr. Wedertz amended his patent application to exclude the Swift mill site from consideration. The Associate Solicitor's Memorandum, E-63-2026.10a (July 1, 1963), states that if more than one millsite is applied for in connection with a group of lode claims, and a sufficient and satisfactory reason therefore is shown, more than one 5-acre mill site can be patented in connection with a group of contiguous lode claims. Mr. Wedertz is not precluded from again seeking patent to the Swift mill site, but the merits of such a patent application will be considered in light of the case file as then compiled.

First, the appellant presents a legal question: The Forest Service contends that 43 CFR 185.65(b) of the departmental regulations, concerning applications for patent of a mill site by the owner of a patented mining claim, is inconsistent with the requirements of section 2337 of the Revised Statutes (30 U.S.C., 1958 ed., 42). The Forest Service asserts that since the subject mill site does not encompass a quartz mill or reduction works, a patent can only issue for such a mill site in connection with the patenting of a vein or lode. There is no merit to the appellant's contentions. It has long been established that under the first clause of section 2337, supra, the owner of a patented lode mining claim may by an independent application secure a mill site, if good faith is manifest, the improvements are sufficient, and no adverse claim exists. See Eclipse Mill Site, 22 L.D. 496, 499 (1896); Associate Solicitor's Memorandum, supra.

At the hearing a mining engineer employed by the Forest Service (Tr. 6) testified that he had examined the mill site (Tr. 7) and found two old cabins as the only improvements on the site. The smaller cabin is one story high, approximately 14 x 16 feet in exterior dimensions, and is in a state of general disrepair and disuse. The cabin does not have a door on its hinges. The witness testified that the other cabin is two stories high and is approximately 25 x 30 feet in exterior dimensions. He found that some repairs had been made on this cabin (Tr. 10-12). The mining engineer could not examine the interior of the larger cabin because the door was locked and the windows covered (Tr. 11, 15, 26). The witness testified that he found no one on the land, could observe no active use being made of the site, and saw no equipment on it (Tr. 14-15).

Mr. Wedertz testified that he uses the larger cabin on the mill site to store building material which he plans to use to repair the smaller cabin (Tr. 26-31), and as a place for storing a few hand tools (Tr. 31-32). He stated that he has had repairs made to both cabins (Tr. 25-26). The patent applicant testified that the mine has not been actively worked since the 1930's (Tr. 32). He stated that he relies upon the reports of his consulting geologist for information as to the mineral content of the mine (Tr. 29).

The applicant's consulting geologist testified that the mine must be explored before its potential can be determined (Tr. 36,37). He stated that the mine cannot be explored until a blower is purchased and installed since it is not possible to work beyond 500 feet in the tunnel by which the mine can be entered without additional air (Tr. 37-38), or until pumping equipment is obtained to remove the water filling the top shaft (Tr. 27).

The geologist stated that he is of the opinion that the expense of exploring the mine will be increased in the event the mill site is not used as a place for the miners to stay (Tr. 39).

Mr. Wedertz testified that he will explore and possibly develop the mining property in the event that he can persuade investors to help finance the expense in anticipation of a future increase in the price of gold and silver (Tr. 30). In the meantime, the patent applicant testified that he has cut a trench to drain water from the entrance to the tunnel leading to the mine, rebuilt some of the framework in the tunnel, done some prospecting, and purchased some items of equipment for use in prospecting or developing the mine (Tr. 27-28).

The mill site is not being used as alleged in the amended patent application as present living quarters for a crew engaged in operating the patented mining property, and as an office and storage place in connection with the operation of the mine. However, the Hearing Examiner, in substance, concluded that the applicant has in good faith improved the two buildings on the mill site and has rehabilitated such buildings for workmen who will be employed in connection with operating the mine, and that the patent applicant has, thus, met the requirements necessary insofar as improvements and use of the mill site are concerned to obtain patent. We do not agree that the factual situation as shown at the hearing warrants the finding that the mill site claimant is entitled to a patent at this time. The Forest Service is correct in its assertion on appeal that the proposal of the mill site claimant to use the mill site for mining purposes at such future time as he can obtain financial assistance to explore and evaluate his patented properties is not a sufficient showing to warrant granting a patent for such land pursuant to section 2337, supra, for obtaining a mill site. See United States v. S. M. P. Mining Company, 67 I.D. 141, 144 (1960). Moreover, we do not agree with the Hearing Examiner that Mr. Wedertz has sustained the burden of showing such present occupation or use of the mill site claim at the time of the application for patent as would satisfy the requirements of section 2337, supra. The only present use being made of the mill site is as a storage place for material to repair the cabins, and as a place for the consulting geolgist to spend 3 to 5 nights a year (Tr. 39) while exploring the tunnel leading to the mine, but not operating the mine.

Accordingly, the decision of the Hearing Examiner is vacated, the mill site is determined to be invalid, and the amended application for patent is rejected.

Mr. Gilbert Wedertz is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Forms 4-1365 and 4-1429. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed Mr. Wedertz will have the burden of showing wherein the decision appealed from is in error.

If an appeal is taken by Mr. Wedertz, the attorney for the adverse party who must be served is:

Regional Attorney
Office of the General Counsel
United States Department of Agriculture
25 Taylor Street, Room 624
San Francisco 2, California

Assistant Director

Enclosure (2)

DISTRIBUTION:
Hon. Harold T. (Bizz) Johnson, House of Representatives
Mr. Gilbert C. Wedertz (Certified Mail)
Regional Attorney, Office of the General Counsel
Mr. Benj. C. Mickle, former attorney for Mr. Wedertz
Forest Service, Div. of Recreation and Land Uses, U.S.D.A.
Office of the General Counsel, Forestry and Lands Division, U.S.D.A.
Division of Minerals (3)
Administrative Assistant, Hearings
Gower FederalSService
Appeals List No. 1
JHO'D

PT. OF INTERIOR
ACRAMENTO, CAL.
SEP 3 10 00 AM 1963
BUREAU OF LAND MANAGEMENT
LAND OFFICE

In reply refer to:
6.05c
Contest Nos. 0170935-C-165
0170935-C-167
(Los Angeles)
August 20, 1963

Certified Mail
Return Receipt Requested

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

DECISION

United States, Contestant :
v.
Naomi I. Rudell, Contestee :
and :
United States, Contestant :
v.
Evelyn Foust, Contestee :

Damp, Dan and Dally Placer
Mining Claims situated in
Sec. 11, T. 28 S., R. 37 E.,
M.D.M., Kern County, California.

Appeal Dismissed, Los Angeles 0170935-C-167
Decision Affirmed, Los Angeles 0170935-C-165

Naomi Rudell, for herself and on behalf of Evelyn Foust, has appealed from a decision of the Riverside Land Office, dated July 16, 1962. That decision declared null and void certain mining claims of various individuals, including the Dan and Dally placer claims of Miss Rudell and the Damp Placer claim of Evelyn Foust.

Miss Rudell was allowed 15 days from receipt of our letter of December 17, 1962, within which to submit information concerning her eligibility to represent Miss Foust in the appeal relating to the mining claim of Miss Foust, as required by departmental regulation 43 CFR 1.3. Our December 17 letter was received by Miss Rudell as evidenced by return receipt card signed by her on December 22, 1962. The requested information has not been submitted.

It is clear that Miss Rudell was fully informed by our December 17 letter of the requirements for practice before the Department. Thus she had an opportunity to show any qualification that she had for prosecution of the appeal on behalf of Miss Foust and that she failed to do so. Accordingly, it is necessary to conclude that Miss Rudell was not eligible to present an appeal on behalf of Evelyn Foust, and the appeal must therefore be dismissed insofar as it relates to Miss Foust's mining claim. Kay Ann Turner, 68 I.D. 85 (1961).

In regard to the Dan and Dally placer claims of Miss Rudell, the record shows that contest proceedings (Los Angeles 0170935-C-165) were brought in the name of the United States against the claims. The contest complaint, dated October 9, 1961, charged that the land embraced within the claims is nonmineral in character and minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery. The complaint was served on Miss Rudell, the contestee, on October 10, 1961, as evidenced by a post-office return receipt card. The complaint also stated that unless the contestee filed an answer to the complaint, as provided in 43 CFR Part 221, within 30 days after service of the complaint, the allegations of the complaint will be taken as admitted and the case decided without a hearing. A purported answer to the complaint denying the allegations of the complaint, received in the Los Angeles Land Office on November 8, 1961, was over a manual signature in the name of the contestee under which appears the phrase "In Propria Persona" followed by the written initials "L.H.R.". It is styled thusly:

"By Naomi I. Rudell
IN PROPRIA PERSONA L.H.R."

The decision appealed from, holding that the "In Propria Persona" answer is void as to the party whose purported signature appears thereon, is premised upon a finding that this and many other answers were prepared, signed and filed by one Lewis H. Reece, without the knowledge and consent of the contestees and the conclusion that any attempt to claim that Mr. Reece represents the contestee would fail because he is not a person authorized, under 43 CFR Part 1, to practice before the Department on behalf of anyone other than himself or a member of his family.

On appeal the appellant neither denies nor refutes the basis for the land office decision or points out any error therein, but merely states that for three years she has paid for the necessary improvements on the claims and has paid the taxes for two years.

The departmental regulations (43 CFR 1.2(c)) governing the participation of individuals in proceedings in which rights are asserted before or privileges are sought from the Department defines "practice" to include "any action taken to support or oppose the assertion of a right before the Department, . . . and the term 'practice' includes any such action whether it relates to the substance of, or to the procedural aspects of handling a particular matter."

Further, the rules of practice of the Department governing private contests provide that a contestee "must" file an answer within 30 days after service of a complaint upon him and that if an answer is not filed as required "the allegations of the complaint will be taken as admitted by the contestee" and the case decided without a hearing. 43 CFR 221.64; 221.65(a). The regulations also provide that proceedings in Government contests "shall be governed" by the rules relating to private contests, with exceptions not material here. 43 CFR 221.68.

A person who, in response to a contest complaint before the Bureau of Land Management, executes and submits an answer, is engaged in an action which relates to a procedural aspect of a contest and as such constitutes "practice" before the Department. Consequently, where a purported answer is executed by one who is not authorized to "practice" before the Department, the answer is unacceptable and a nullity, Cf. Kay Ann Turner, supra.

The fact of the appellant's failure to deny the status of Reece, as determined in the decision appealed from and her failure to present evidence to prove that it was with her prior knowledge and consent that Reece executed and submitted the answer in question and also prove that Reece is within one of the categories specified in the regulation (43 CFR 1.3(3)) permitting him to practice before the Department on her behalf, it must be taken as an admission that the basis for the land office decision is correct.

As the purported answer is without validity, force or effect, and since no proper answer was filed by the appellant within 30 days after service of the contest complaint, it must be interpreted as an admission of the charges of the complaint. As a consequence, under the rule in United States v. Smith, 67 I.D. 311 (1960), the appellant's mining claims were properly declared null and void.

Accordingly, the decision appealed from is affirmed.

Misses Rudell and Foust are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision the total filing fee is $15.00. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

John B. Piccolo
Acting Chief
Division of Appeals

Enclosure

DISTRIBUTION
Miss Naomi I. Rudell (Certified Mail)
Miss Evelyn Foust (Certified Mail)
Division of Minerals (3)
Gower Federal Service, Boulder, Colorado
WHW

DOCKET FILES

[illegible] OF INTERIOR
[illegible] CAL.

SEP 16 10 00 AM 1963

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:
6.05c
Arizona 023929
September 6, 1963

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Norman M. Rehg : Maher, Gladys, Halderman, O.K., Florence, Wee Kick "C", Wee Kick "D", and Wee Kick Nos. 19, 20, 23 and 24 Mining Claims located in sec. 36, T. 15 S., R. 22 E., GSR Mer., Arizona.

Decision Affirmed; Petition Denied

Mr. Norman M. Rehg has appealed from that part [1] of the Land Office Manager's decision, dated May 15, 1961, dismissing the appellant's protest against the State of Arizona's application (Arizona 023929) for patent to certain subdivisions of the above-described school section (pursuant to the act of June 21, 1934 (43 U.S.C., 1958 ed., 871a)). The lands in issue are embraced by the above named mining claims.

On November 28, 1962, we received in this office a second supplemental statement of reasons by the appellant in support of his appeal. However, this document stated that he was also appealing from the Manager's decision, dated March 23, 1962, allowing Mr. Rehg an extension of 30 days within which to furnish the original location dates of the Maher and Halderman mining claims. (By decision, dated April 2, 1962, the Manager extended the time again for furnishing this information.) Mr. Rehg's present attempt to appeal from the decision of March 23, 1962 was filed long after the 30-day period provided by the rules of practice, 43 CFR 221.2. Consequently, the appeal from the decision of March 23, 1962 will not be considered.

The Enabling Act of June 20, 1910 (36 Stat. 557, 572-573) provides that certain numbered sections (including sec. 36) in each township in the State of Arizona, under certain conditions, are granted for the support of the common schools of Arizona. Such grants, as a rule, are effective and operate to vest title upon the date of the admission of the State into the Union as to lands then surveyed. See 43 CFR 270.24. The official plat of survey for T. 15 S., R. 22 E., GSR Mer., was accepted on February 11, 1909. Thus, the lands had been surveyed prior to February 14, 1912, the date Arizona was admitted into the Union (37 Stat. 1728-1729).

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[1] Mr. Rehg has not appealed from that part of the decision affording the State of Arizona an opportunity to initiate private contest proceedings against the Louie, Ella, Dora, Wolfine, Calumet, Mary, Gustava, Ina, Charles, Hagerman, Erika, Ernest and Ultimo mining claims.

By letters dated April 3 and 24, 1961, respectively, Mr. Rehg informed the Land Office Manager that the Florence mining claim was located on July 2, 1921 (he also submitted a copy of a location notice by T. C. Miller showing this date), and that the six Week Kick mining claims in issue were each located in 1943 and relocated on April 24, 1949. 2/ Once complete title to land vests in a State the land is no longer subject to appropriation under the general mining laws. Thus, the decision appealed from held that the Florence and six Wee Kick mining claims had been located subsequent to the date Arizona was admitted into the Union, and dismissed, Mr. Rehg's protest concerning lands within these mining claims for the stated reason that, in any event, the mining claims had been located on lands in which the title had previously vested in the State of Arizona.

Mr. Rehg contends, in substance, on appeal, that the Florence mining claim was located prior to the earliest date that title to lands in the school section could vest in the State of Arizona.

First, Mr. Rehg, in effect, bases his contention on the Enabling Act, supra, which excluded lands that are mineral in character from the grant of the numbered school sections. On appeal, Mr. Rehg has submitted a written statement by Mr. Axel L. Johnson, field engineer for the State of Arizona Department of Mineral Resources, dated November 20, 1962, stating that the field engineer is of the opinion that sec. 36 is "mineralized." Mr. Rehg appears to be contending that title to the school section could not vest in the State of Arizona prior to the enactment of the act of January 25, 1927 (43 U.S.C., 1958 ed., 870), which, subject to certain provisions, extended the several grants to the States of numbered sections for the support of schools to embrace sections in place

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2/ The earlier dated letter also stated that the Gladys, O.K., Louie, Ella, Dora, Wolfine (or Wolfrime), Calumet, Mary, Gustave, Ina, Charles, Hagerman, Erika, Ernest, and Ultimo ming claims were located between December 22, 1898 and January 1, 1912, inclusive, which would be prior to the admission of the State of Arizona into the Union. The letter stated that a search would be made to determine the dates of location of the Halderman and Maher mining claims.

which are mineral in character. However, the act of January 25, 1927, *supra*, is applicable only to school sections *known* to be of mineral character at the effective date of the original school land grant. See *Dorothy P. Soeth*, 60 I.D. page 1 (1947). Mr. Johnson's statement concerns *facts known* at the time he prepared the statement (November 20, 1962), but does not contain information showing that the lands were *known to be mineral in character on February 14, 1912*, so as to preclude title from vesting in the State on that date. The Director, Geological Survey, has informed the Bureau of Land Management that sufficient information is not available in his office to determine whether the subject lands were known to be mineral in character as of February 14, 1912. In the event Mr. Rehg initiates an appropriate contest proceeding against the State's application he *will be afforded* an opportunity to offer any pertinent evidence that he may have as to the known mineral character of the land embraced within the Florence mining claim on February 14, 1912. However, in light of the information contained in the case record as compiled, the Manager properly dismissed the appellant's protest as to lands embraced by mining claims located between July 2, 1921 and April 25, 1949 (the Florence and six Wee Kick mining claims). See 43 CFR 270.33.

Next, in support of his assertion that the protest had been improperly dismissed as to lands within the Florence mining claim, Mr. Rehg has submitted a photostat copy of a notice of location of a Florence mining claim on October 21, 1903 (which would be prior to the admission of the State into the Union), by William Hutton, J. D. Goodin and Mrs. J. D. Goodin. The metes and bounds description in this notice of location, by itself, is insufficient to determine whether it refers to lands within sec. 36 and is the same Florence mining claim which T. C. Miller is now claimed to have relocated on July 2, 1921. In any event, as with all of the mining claims involved in this decision, there is not the required showing in the case record of an unbroken chain of title from Messrs. Hutton and Goodin and Mrs. Goodin to T. C. Miller and then to Mr. Rehg.

Where lands in a school section are alleged to be appropriated under the public land laws by a private party, *prior to the time title could have vested in the State*, the Federal Government's interest is related only to whether there is a valid prior claim, and the real parties in the controversy are the State and the adverse claimant. The Government will not intervene except in extenuating circumstances. Where the adverse parties come before the Department to have their rights determined in an appropriate proceeding, prior to patent, the Department does have jurisdiction to resolve the issues. The rules of practice (43 CFR 221.51) provide, in pertinent part, that any person who claims title to, or an interest in a land adverse to any other person claiming title to, or an interest in such land, may initiate proceedings constituting a private contest governed by the regulations (see 43 CFR 221.53 et seq.), to have the claim or title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management.

Where a protest alleging a prior claim is filed, (1) the State is required to contest claims shown on the land office records to have been asserted prior to the alleged vesting of title in the State, and (2) the mining claimant must initiate the private contest as to other claims. See Joe A. Deckert, New Mexico 01012-C (June 6, 1962).

The decision appealed from dismissed Mr. Rehg's protest concerning lands in sec. 36 embraced within the Gladys and O.K. mining claims. However, contrary to the appellant's assertions on appeal, the Manager did not find that these two mining claims were located after Statehood. The protest was dismissed against lands within the Gladys and O.K. mining claims for the stated reason that these claims were not shown on the Bureau's land office records prior to processing the State's application for patent to the land. During publication by the State of Arizona, Mr. Rehg filed his protest alleging ownership of the mining claims in sec. 36 and this appears to be the first record the Bureau had of the Gladys and O.K. mining claims. The appellant has not asserted that these two mining claims were in fact shown on Bureau records prior to the filing of the Rehg protest, and, consequently, has not made a showing which would warrant changing the decision appealed from, which merely requires Mr. Rehg to initiate the contest as to these two claims.

The decision appealed from properly determines that the mining claimant has no interest in those mining claims located upon lands in which title had previously vested in the State of Arizona. The relocation of a mining claim upon lands no longer in Federal-ownership is also a nullity. However, as to those mining claims located prior to the time title to the land could vest in the State, the decision appealed from does not determine that the mining claimant has no interest in the claims adverse to the claim of title of the State of Arizona, but merely suggest a procedure for resolving the conflicting claims to the lands. There is a presumption, which exists until the contrary is shown, that title to a numbered school section indentified by survey has passed to the State. See Mrs. Virginia E. Lewis et al., 66 I.D. 204, 210 (1959). Thus, in the event the appellant fails to take appropriate action, the State's application for patent will be further considered to determine if the requested patent should issue as to land in sec. 36 embraced within the Gladys and O.K. mining claims.

Accordingly, the decision appealed from is affirmed. Moreover, since Mr. Rehg has stated on appeal that he is unable to show when the Halderman and Maher mining claims were located, his protest is herewith dismissed as to lands in sec. 36 embraced by these claims. Then this decision becomes final, the case will be remanded to the Land Office at Phoenix, Arizona, for further appropriate processing of the State's application for patent. However, the Land Office shall suspend processing of the application for a period of 30 days from the day this decision becomes final in order that the appellant may have an opportunity to initiate a private contest against the State's application as to lands in sec. 36 within the Gladys and O.K. mining claims. Moreover, this decision shall not preclude the Land Office from reconsidering that part of its decision concerning lands embraced within the Florence mining claim in the event a suitable showing is made that this mining claim was in fact located prior to the date that Arizona was admitted into the Union and that Mr. Rehg has shown an unbroken chain of title from that locator to himself, supported by suitable proof. Furthermore, Mr. Rehg, during the aforesaid 30 day suspension period, is not precluded from initiating a contest against the State's application including lands within the Florence mining claim in the event he alleges and assumes the burden of proving that the land was known to be mineral in character on the date the State was admitted into the Union. Prior to instituting contest proceedings involving any of the mining claims, Mr. Rehg should submit a showing (such as abstracts of title) to the Land Office that he is the owner of each mining claim involved through an unbroken chain-of-title from the locator who made his location prior to the time title to the land would otherwise vest in the state. Cf. John D. Archer et al., 67 I.D. 181, 187 (1960).

With his appeal, Mr. Rehg has petitioned for a determination as to the validity of all of the mining claims named in this decision. A right in a mining claim is established by a series of acts including discovery of a valuable mineral deposit within the limits of the claim, marking the boundaries of the claim, posting notice on the claim, and recording the claim in the manner required by the regulations of the mining district. See Jebson et al.,v. Spencer et al., 61 I.D. 161, 166-167 (1953). There is no showing in the case record at present which would warrant a finding that Mr. Rehg and his predecessors-in-interest have met these conditions as to any of the mining claims named in this decision. Accordingly, Mr. Regh's petition to have the validity of the mining claims determined in this appeal is denied.

Mr. Norman M. Rehg is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Circular 1999. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington 25, D.C. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of showing wherein the decision appealed from is in error.

If an appeal is taken by Mr. Rehg the adverse party who must be served is:

State Land Department
State of Arizona
Capitol Annex
17th Avenue and Adams
Phoenix, Arizona

H.R. Hochmuth

Associate Director

Enclosures
(Circular 1999, 2068, Form 4-1429)

DISTRIBUTION:
Mr. Norman M. Rehg (Certified Mail)
State of Arizona, State Land Department
Hon. Carl Hayden, United States Senate
Gower Federal Service, Boulder, Colorado
Division of Lands and Recreation
Division of Minerals (3)
Appeals List No. 1
JHO'D

DOCKET FILES

In reply refer to:
6.05c
PL 57-6
PL 57-7
Sacramento

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

September 18, 1963

DECISION

Weeds Point Mining Company : Verified Statements
Channel Mining Company : (Act of July 23, 1955)
:
: Horse Valley Nos. 1, 2 and 3, Weeds
: Point Annex, and Big Rock Placer Mining
: Claims and Bull of the Woods Lode
: Mining Claim, situated in secs.
: 26 and 35, T. 19 N., R. 8 E.,
: M.D.M., California
:

Decision Reversed in Part and Set Aside in Part

The Weeds Point Mining Company has appealed from a Sacramento Land Office decision of May 2, 1963, declaring the following mining claims, 1/ situated in secs. 26 and 35, T. 19 N. R. 8 E., M.D.M., California, null and void and rejecting its verified statement, (PL 57-6) filed pursuant to section 5 of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 613), covering them:

Horse Valley No. 1	located on October 4, 1930
Horse Valley No. 2	located on October 4, 1930
Horse Valley No. 3	located on October 4, 1930
Bull of the Woods	located on October 6, 1930
Weeds Point Annex	located on March 10, 1932
Big Rock	located on August 8, 1940

The Channel Mining Company, named in the decision referred to above, has likewise appealed because that decision was also applicable to the Big Rock placer claim, the sole mining claim described in its verified statement (PL 57-7), also filed pursuant to section 5 of the cited act.

The basis for the decision appealed from was that the lands described in the mining claim location notices are either patented or were withdrawn in 1922 and 1924 from entry, location or other disposal under section 24 of the act of June 10, 1920, known as the Federal Power Act, (16 U.S.C. 1958 ed., sec. 818), for Power Project No. 187.

1/ The notice of appeal filed by the Weeds Point Mining Company, shows a deletion of the Rainy Day mining claim from it by means of a red ink line running through the name of the claim which is preceded by the word "Omit" in red ink and followed by the initials "W.A.F.". As a consequence, this decision does not include the Rainy Day mining claim.

The appellants on appeal contend (1) that the Government has no jurisdiction to declare mining claims on patented land null and void; (2) that the Government has no authority in a proceeding under the act of July 23, 1955, to declare mining claims null and void, but is limited to determining the surface rights on unpatented mining claims; (3) that the use of the term "withdrawal" with reference to the act of June 10, 1920 is a misnomer; and (4) that the Federal Power Act provides that if actual construction of a project is not commenced by the licensee within the time prescribed in the license (not more than two years), the license shall be terminated by the commission (16 U.S.C. 806) and no attempt was ever made to commence any power project on the lands involved. It also asserted on appeal that ownership of the claims, by appellant's predecessors in interest, antedates the enactment of the Federal Power Act and any application for Power Project No. 187, and that they were relocated to clearly define the existing claims.

The act of July 23, 1955, supra, provides in part that persons who own mining claims located prior to the passage of the act must, when called upon to do so by a published notice assert their rights to the use of the surface of their claims. The assertion of rights takes the form of a verified statement as prescribed by section 5 of the act (supra). The statement must be filed within 150 days from first publication of the notice.

We have verified the status records which show that the above-named mining claims embrace lands that are either public lands or were patented prior to 1883. The public lands involved were withdrawn for Power Project No. 187 in 1922 and 1924 and such lands were not open to mining location on the dates of location disclosed in the verified statements and locations notices.

The case records show that a notice (PL 57) requiring mining claimants to file verified statements under the act was first published on November 26, 1958, pursuant to the request of the Forest Service, United States Department of Agriculture. Before April 25, 1958, the final day for filing verified statements in this case, the above-named companies filed statements stating that the claims were located in the months and years listed in paragraph one hereof.

The appellants' first contention is correct for it is well established that after an unrestricted patent for public land has been issued the legal title passes from the United States and the Department is thereafter without jurisdiction to determine any question of rights in such land. Everett Elvin Tibbets, 61 I.D. 397 (1954); Doris L. Ervin et al, A-29393 (July 8, 1963). Therefore, to the extent that the decision appealed from implies that those portions of the subject mining claims that are on patented land are null and void ab initio, the decision is reversed.

The correctness of the second contention that the Government has no authority in a proceeding under the act of July 23, 1955, to declare mining claims null and void need not be determined here because the declaration that the appellants' claims are null and void must be set aside in any event.

We now turn to the assertion on appeal that the mining locations under the dates shown in the verified statements are relocations of earlier locations made when the land was open to mining entry. The question here in issue is whether, after a verified statement has been timely filed giving information required by statute, a matter which was incorrectly set forth in the statement may be corrected.

In the case of Mr. and Mrs. Ted R. Wagner, 69 I.D. 186 (1962), involving similar facts and the identical question, it was stated, "/s/ince the statute and the governing regulations make no provision for the correction or amendment of a verified statement, the allowance or disallowance of the appellants' request . . . is a matter of administrative discretion." The Department noted that "an invariable refusal to allow correction of a mistake in a verified statement which was timely filed would mean that proceedings under the act of July 23, 1955, might be determined on an incorrect factual basis." It added, "where a verified statement has been timely filed and a mining claimant gives mistaken information therein which if not corrected, might lead to a distorted or improper ruling by the Bureau or the Department, I think that either the claimant should be allowed to correct the verified statement for purposes of proceeding under the act of July 23, 1955, or, if not, then the disputed or incorrect information in the verified statement should not be adopted as a basis for final action or decision which was not expressly provided for by the act of July 23, 1955." (Emphasis added).

Accordingly, the declaration that the mining claims involved in this appeal are null and void is set aside.

There remains for consideration contentions 3 and 4. Briefly, Section 24 of the Federal Power Act of June 10, 1920 (41 Stat. 1063), reads, in pertinent part, as follows:

> "That any lands of the United States included in any proposed project under the provisions of this Act shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress. . . ."

Accordingly, the public lands in Power Project No. 187, covered by the mining claims involved, from the date of application therefor were closed to mineral entry or location whether for metalliferous or nonmetalliferous minerals. Coeur D'Alene Crescent Mining Co., 53 I.D. 531 (1931). Prior to or at the time of the location dates shown in paragraph one, neither the Commission nor Congress had directed that any of the public lands involved in the instant case be restored or opened to mineral entry or location.

The case records are remanded to the Sacramento Land Office, through the Bureau's State Director for California, to give the mining claimants a reasonable time within which to furnish evidence of the earlier locations of the claims and proof of their chain of title; following the submission thereof, to decide whether to allow or deny amendment of the verified statements. In the event amendment is allowed, the amended verified statements shall then be processed in the same manner as if the original verified statements had shown earlier locations when the land was open to mining entry. However, if amendment is not allowed, then a hearing under section 5 of the act of July 23, 1955, must be held to determine the dates of locations of the mining claims involved. Mr. and Mrs. Ted R. Wagner, supra. Other pertinent issues which the Forest Service may raise shall also be considered at the hearing.

Dale E. Zimmerman
Chief, Division of Appeals

DISTRIBUTION:

Weeds Point Mining Company
Channel Mining Company
Regional Forester, Forest Service, U. S. Department of Agriculture
Forest Service, Division of Recreation and Land Uses, U. S. Department of Agriculture
Division of Minerals (3)
Gower Federal Service
Appeals List No. 1
WHW

appeal to Sec
affirmed A-30178
4-9-64
Supp- 8-3-67

DOCKET FILES

DEPT. OF INTERIOR
SACRAMENTO, CAL.
OCT 14 10 00 AM 1963
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
6.05c
Sacramento Contest No. 5823

October 4, 1963

Certified Mail
Return Receipt Requested

DECISION

United States	:	Involving the Summit lode mining claim, situated in
v.	:	Sec. 11, T. 5 N., R. 13 E., MDM, Calaveras County,
Roy Calvin Westmoreland	:	California.

Decision Reversed

The United States of America, by and through the California State Director, Bureau of Land Management, has appealed from a decision issued by the Hearing Examiner, dated May 14, 1963, dismissing the contest complaint filed by the United States. The complaint alleged that the land within the limits of the above-identified claim is nonmineral in character, 1/ and that minerals have not been found within the limits of the claim in sufficient quantity and quality to constitute a valid discovery. The Examiner held that as there is "a possibility that a prudent man would hold the claim with a reasonable expectation of developing a paying mine," a discovery exists on the claim. (Emphasis added).

The United States contends, in essence, that the Hearing Examiner's findings of fact and conclusions of law are not supported by the evidence of record and the authorities upon which he relied. It points out that the reports of the 14 assay samples taken from the claim do not show the presence of gold in significant quantities, that sample number 2, which shows the highest value of gold per ton, $9.93, averaged only 5 inches wide and was taken from a vein which "varied in width from 2 inches to 10 inches, pinching out to nothing on the south end where the adit is caved in." (Tr. 15) It asserts that the Hearing Examiner failed to consider the testimony of its expert witness, the only witness to testify at the hearing, to the effect that, when considered from a practical mining standpoint, the value per ton of the gold contained in sample number 2 would be approximately $1.35 because of the dilution that would occur in mining the ore. The United States argues that there is nothing in the record to support the Examiner's conclusion that "It was established that there is a probability that the existing veins

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1/ At the outset of the hearing, the United States expressed its intention to confine the evidence to the charge of lack of discovery and the Hearing Examiner eliminated the charge relative to the nonmineral character of the land. (Tr.6).

would widen at depth." It points out that its witness stated that the vein from which sample number 2 was taken could narrow or disappear, that it would not necessarily widen out and become larger, and that, while it is possible that it could widen out, he could not state that there is a good likelihood that it might. (Tr. 23-24).

The United States further contends that, contrary to the Hearing Examiner's conclusions, it did present a prima facie case in support of its charge of lack of discovery, and that the evidence of record shows only that further exploration of the claim may be warranted, not that there now exists a discovery on the claim.

The hearing transcript shows that the Government's witness examined the claim on May 22, 23 and 25, 1962 (Tr. 12), and that a total of 14 assay samples were taken, all in the presence of and mostly at the suggestion of the contestee. (Tr. 15-17). The results of an assay of the samples taken show values of gold ranging from $0.18 to $9.93. (Exhibit 6). The sample with the highest return, sample S-2, was a channel sample across a hanging wall vein varying in width from 2 to 10 inches and pinching out to nothing on the south where the lower adit is caved in. The average width of the sample was about 5 inches and the length of the sample was 10 inches. (Tr. 15). In connection with this sample, the witness testified that it "represents a vein which at that sampling point was only 5 inches wide. Now, if we were to consider an ordinary stoping for that vein of 36 inches, then we would * * * come up with a value of approximately $1.35 a ton." (Tr. 18). He concluded, on the basis of his examination of the claim and the results of the assay of the samples, that a reasonably prudent man would not be justified in the expenditure of further time and money, with a reasonable prospect of success, in developing a valuable mine. (Tr. 20). He testified that there is no evidence of recent mining activity on the claim, (Tr. 20), that a small tonnage of gold ore averaging $7.00 per ton was reportedly mined from the upper tunnel during the depression, that the only prospecting since that time appears to be minor bulldozing of the surface of the claim, and that all the principal workings on the claim are caved or caving. (Tr. 12). He testified that the vein could widen, narrow or disappear at depth, (Tr. 23), that it was possible that it would widen, but that he could not go so far as to say it was likely because, although it is a persistent vein tracable for several hundred feet on the surface, he does not know whether it widens out or not. (Tr. 24). He stated that he believed sufficient mineral had been exposed or disclosed to justify further prospecting as distinguished from inducing a reasonable expectation of developing a valuable mine. (Tr. 28).

In view of the testimony summarized above, it is clear that the Hearing Examiner erred in concluding that "It was established that there is a probability that the existing veins would widen at depth." The sole witness in the hearing testified that it is possible, but not probable, that the vein widens, but he also stated that it could narrow or disappear, concluding that he did not know whether it widens out or not. It is equally clear that the Government's evidence does present a prima facie case in its favor. Accordingly, it is our opinion that the Hearing Examiner erred in concluding that a discovery exists on the Summit lode mining claim. A hope or expectation that a deposit will increase in value as the depth increases is not enough to validate a mining claim. United States v. Laura Duvall and Clifford R. Russell, 65 I.D. 458 (1958).

It should be noted in addition, that the Hearing Examiner's conclusion that there is a discovery on the claim because "there is a possibility that a prudent man would hold the claim with a reasonable expectation of developing a paying mine," (emphasis added), does not accurately reflect the time honored "prudent man rule" followed by the Department and the courts. The rule so long followed states that a discovery has been made when:

> "minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, * * *." Castle v. Womble, 19 L.D. 455 (1894).

This rule requires more than a "possibility" that a mining claimant would be justified in expending his labor and means.

Accordingly, the decision of the Hearing Examiner is reversed.

Roy Calvin Westmoreland is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D. C. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

In the event an appeal is taken, the adverse party to be served will be: State Director, Bureau of Land Management, P. O. Box 4291, Sacramento, California.

L. T. Hoffman
Assistant Director

Enclosure

DISTRIBUTION
Mr. Orrin K. Airola, Attorney for contestee (Certified Mail)
Mr. Roy Calvin Westmoreland
Gower Federal Service
Division of Minerals (3)
Administrative Assistant, Hearings
Appeals List No. 1
LLM

DOCKET FILES

DEPT. OF INTERIOR
SACRAMENTO, CAL.
OCT 14 10 00 AM 1963
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:
6.05c
Riverside 01399
October 7, 1963

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

Certified Mail
Return Receipt Requested

DECISION

Harry L. Roberts : Mineral Patent Application

Decision Affirmed as Modified

Mr. Harry L. Roberts has appealed from a decision, dated August 31, 1962, whereby his mineral patent application covering the Mesa Chrome No. 1 and Chicken Spring lode mining claims and the Chicken Spring mill site was rejected and the Chicken Spring lode claim was declared null and void *ab initio*. The rejection was predicated upon certain specific defects and deficiencies in the mineral patent application as set out in detail in the Land Office decision. The invalidity of the Chicken Spring lode claim was based upon the fact that almost the entire claim was located on withdrawn land.

The appellant on appeal asserts that he personally prepared the mineral patent application and supplementary documents and proofs in connection therewith, that he was without knowledge of the proper procedures and requirements of the regulations, and hence acknowledges that the supporting documents and proofs were deficient in many respects. He also acknowledges that the two lode claims included in the single application are not contiguous and should not have been included in one application for patent. The appellant states that since filing his appeal he has secured the services of an attorney who is experienced in matters relating to mineral patent applications and urges that he be afforded sufficient time to comply with the decision of the Land Office as to the Mesa Chrome No. 1 lode claim. The appellant also requests the opportunity to make and file a separate and new application for patent on the Chicken Spring lode claim and Chicken Spring mill site. It is further contended that the records at the Riverside Land Office fail to disclose that the withdrawal referred to in the Land Office decision was revoked by an order published on December 17, 1949, citing 14 Fed. Reg. 243. It is alleged that in the year 1950 and in each succeeding year the appellant discovered an extensive deposit of chrome ore in lode form on the Chicken Spring claim. It is asserted that he has been actually in exclusive, open and notorious possession of the land within the limits of the lode claim for more than five years immediately prior to filing the application for patent herein, the local statute of limitation being five years.

According to the certified copy of the notice of location filed with the appellant's patent application the Chicken Spring lode claim was located on August 6, 1942. Mineral Survey No. 6694 A, California, shows that the Chicken Spring lode mining claim lies within the S½SE¼ of section 15, T. 7 N., R. 29 W., S.B.M., California, with the exception of a minute portion in the NE corner of the claim which lies within the N½SE¼ of said section. The records show that all of the S½SE¼ of section 15 of the aforesaid township, range and meridian was withdrawn from appropriation and use of all kinds under the public land laws for use as an administrative site by the Forest Service by an order approved by the First Assistant Secretary of the Interior, effective May 20, 1908.

The appellant is correct in stating that the land has been restored to location and entry under the mining laws. Our records show that an order designated as Misc. 48918, dated December 13, 1949, revoked certain withdrawals, including the order of May 20, 1908 and particularly the S½SE¼ of sec. 15, T. 7 N., R. 29 W., S.B.M., California. The proper citation for the publication of the revocation order is 14 F.R. 7570 (December 17, 1949).

At the time the appellant attempted to make his location of the Chicken Spring lode claim in 1942, which location was relied on in his mineral patent application, the land was not open to mineral location and he gained no rights by such location. Therefore, the purported location was null and void, *ab initio*. The fact that the withdrawal of the land from mining location was subsequently revoked does not validate the location made while the land was not open to mineral entry. Since the only location before the Land Office was that attempted in 1942, the decision appealed from properly held that the Chicken Spring lode mining claim location of August 6, 1942, was null and void and is hereby affirmed. A mining claimant who has submitted an application for patent based upon a location made in 1942 may not on appeal change the date of location in his patent application to that of one alleged to be of a more recent date, where it has been determined by the Government that the 1942 location is invalid as a matter of law because the lands were not open to mining location, but he may submit a new mineral patent application at any time on the basis of his alleged new location or possessory right and discovery made after the withdrawal was revoked. Cf. *A. V. Toolson et al.*, 66 I.D. 48 (1959).

Furthermore, in view of the appellant's admission on appeal of the defects and deficiencies in his patent application as expressed in the Land Office decision, that decision must be affirmed. Mr. Roberts, however, is hereby allowed 60 days from receipt of this decision within which to amend his present mineral patent application by withdrawing therefrom the noncontiguous claims and within which time he must furnish the Land Office at Riverside, California, with such supplementary data, document and proofs as required by the decision appealed from for the claim remaining in his mineral patent application, failing in which the rejection of his application will stand.

Mr. Roberts is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D. C. within 30 days from receipt of this decision. The filing fee will be computed on the basis of $5 for each mining claim or mill site included in the appeal. If the appeal covers all mining claims and the mill site adversely affected by this decision the total filing fee is $15. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

John B. Piccolo

Chief, Branch of Mining and
Grazing Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Lonergan & Jordan, Attorneys for Appellant (Certified Mail)
Mr. Harry L. Roberts
Forest Service, Division of Recreation & Land Uses, U.S.D.A. (8)
Office of the General Counsel, Division of Forestry & Lands, U.S.D.A.
Division of Minerals (3)
Gower Federal Service (1)
Appeals List No. 1
WHW

Affirmed
Ltr Dec A-30172 4-1-64

Appeal To Sec

DOCKET FILES

DEPT. OF INTERIOR
SACRAMENTO, CAL.

OCT 14 10 00 AM 1963

BUREAU OF
LAND MANAGEMENT

LAND OFFICE

In reply refer to:
6.05c
Sacramento Contest Nos.
071211 and 072446

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

October 7, 1963

Certified Mail
Return Receipt Requested

DECISION

United States, Contestant-Appellee	:	Involving the Quigley Consolidated, Mazatlan, Madero, Forty-Niner and Florentina placer mining claims. Located in Sections 21, 28, 29 and 31, T. 22 N., R. 9 E., M.D.M., Plumas County, California
v.	:	
Patricia Lemoge Hudelson, 1/ Contestant-Appellant	:	

Decision Affirmed

Patricia Lemoge Hudelson has appealed from a Hearing Examiner's decision, dated May 31, 1963, as corrected by a decision dated June 5, 1963, declaring null and void the above-identified placer mining claims for lack of discovery.

In her reasons for appeal, counsel for the contestee contends that the Examiner's decision is without effect because there was filed, as a part of the answer to the contest complaint, a motion to dismiss, upon which no ruling has been made; that there was no counter-showing made in opposition to the motion to dismiss; and that under the rules of practice in all of the courts of the land motions directed toward a pleading must be disposed of before the matter at issue may be decided and a decision rendered. The contestee's attorney states, in addition, that there has been a growing tendency on the part of Hearing Examiners to brush aside any objections by a contestee and to consider only the case that is presented by the Government, because the Examiners are not authorized to operate independently but are "part and parcel" of the office of the Solicitor of the Department of the Interior.

According to the record, the contestee was served with a copy of the complaint issued in connection with Contest No. 071211, involving the Mazatlan, Madero, Forty Niner and Florentina claims, on May 21, 1962, and that she received a copy of the complaint issued for Contest No. 072446, involving the Quigley

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1/ The contest complaint was addressed to Patricia Lemoge Hudelson and D. H. Hudelson. Mrs. Hudelson asserts that D. H. Hudelson has no interest in the claims as she acquired them "through devise and descent" which, under the laws of the State of California, make the claims her sole and separate property. This apparent misjoinder of parties is not, however, grounds for dismissal of the complaint. Cf. Rule 21 of the Federal Rules of Civil Procedure.

Consolidated claim, on August 8, 1962. In response to the complaint issued in Contest No. 071211, the contestee filed an "ANSWER AND MOTION TO DISMISS" in which she denied the charges against the claims and, for reasons enumerated in the answer, asked that the contest be dismissed. In response to the complaint issued in connection with Contest No. 072446, the contestee filed a "MOTION TO DISMISS AND ANSWER" in which she denied the charges against the claim and asked that the contest "be dismissed as being instituted and prosecuted without authority of law and not in the name of the real party in interest;2/ or, in the alternative, that said matter be set down for a hearing * * *."

The record next shows that the contestee received on November 8, 1962, a "NOTICE OF HEARING." This notice, dated November 6, 1962, directed the contestee to appear at a hearing on December 10, 1962, for the purpose of receiving oral testimony and documentary evidence upon any and all material issues, and that the matters of fact and law asserted in the contest action were those set forth in the contest complaints which had been served on the contestee.

In a decision dated November 21, 1962, the Hearing Examiner postponed the hearing at the request of the contestee's attorney, who, in a letter dated November 20, 1962, stated the request was made because he would be out of town during the first part of December. The decision stated that the hearing would be rescheduled at a time agreeable to all parties.

By letters dated January 30, 1963, the attorney for the contestee advised the Hearing Examiner that the contestee would not appear on the day set for the hearing, February 4, 1963, because the Examiner had not ruled on the contestee's motions to dismiss the contest complaints, and that they would, therefore, "be taken by surprise should they appear on the day of hearing in an attempt to establish a defense." The hearing was, nevertheless, held on February 4, at which time the contestant presented a prima facie case in support of its charge of lack of discovery.

At the outset of the hearing, the Examiner ruled, in substance, that, as the concluding paragraph of the contestee's answer asked that the contest be dismissed or, in the alternative, that a hearing be held, the setting of the hearing was a denial of the motion to dismiss (Tr. 4).

We agree with the Examiner that the setting of the hearing was, in effect, a denial of the contestee's motion to dismiss insofar as Contest No. 072446 is concerned. It is only in this contest that the concluding paragraph of the contestee's answer is worded in the alternative. The answer and motion to dismiss filed in connection with Contest No. 071211 does not include such language. In it the contestee asks only "that the said Contest be dismissed on the grounds and for the reasons above set forth." Thus, the question for

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2/ See footnote 1.

consideration is whether or not the contestee was prejudiced 3/ by the Examiner's failure to rule formally on the motion to dismiss filed in connection with Contest No. 071211.

In this connection, the contestee asserts she would have been "taken by surprise" if, at the hearing, she would have had to establish a defense. With this assertion we cannot agree. It has been held that the "surprise" for which relief may be granted must be some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any default or negligence on his part, which ordinary prudence could not have guarded against. Cf. In re Nash, 102 Cal. App. 2d 220; 227 P. 2d 270, 272 (1951). In the instant case it cannot be seriously argued that a defense of the claims on the day set for the hearing would have been unexpected even though no formal decision on the motions to dismiss had been made. On November 8, 1962, well after the combined answers and motions to dismiss were filed by the contestee, she received a Notice advising her that a hearing would be held for the purpose of receiving evidence upon any and all material issues of fact and law raised by the complaints she had previously received. Moreover, the contestee's attorney petitioned for, and was granted, a continuance of the hearing, not because a formal decision had not been issued on the motions to dismiss, but because he was to be out of town during the first part of December.

The contestee's attorney, Mr. Charles L. Gilmore, has, in previous appeals, attacked the competency and independence of the Department's Hearing Examiners. Mr. Gilmore's objections have been considered and answered on several occasions, including the decision in United States v. Patricia Lemoge Hudelson, California Contest No. 5889 (February 7, 1963), in which case he acted as Mrs. Hudelson's attorney. For this reason we overrule without discussion here the arguments Mr. Gilmore has made regarding this matter.

In her motion to dismiss, the contestee asserts, in essence, that the contest was not initiated for the benefit of the United States but is part and parcel of a scheme to harrass and annoy the owner of the mining claims involved and to acquire the land, through the subterfuge of a contest hearing, for the use and benefit of the Oroville-Wyandotte Irrigation District; that it was

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3/ It has been held that paragraph 10(e) of the Administrative Procedure Act (5 U.S.C.A. 1009(e)), which requires a reviewing court to take due account of the rule of "prejudicial error," means that, unless the error is deemed prejudicial, the action of the administrative agency should not be set aside merely because an error was committed by it. U. S. ex rel. Lindenau v. Watkins, 73 F. Supp 216 (1947), reversed on other grounds 164 F. 2d 457 (1947). Hence, even if it is assumed, arguendo, that the Examiner erred in failing to issue a formal decision denying the contestee's motion to dismiss, it must, nevertheless be shown that such error was prejudicial to the contestee's case.

instigated by the Forest Service, United States Department of Agriculture, which had granted the District a permit or license to construct a dam and reservoir; and that the Bureau of Land Management has no jurisdiction to enter into this proceeding because there is no statutory authority for the institution or maintenance of a contest by the United States for the use and benefit of a private person or corporation.

We find the arguments submitted in support of the motion to dismiss to be without merit. The Department of the Interior is charged with the responsibility of determining the validity of claims to public lands "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, 252 U.S. 450 (1920). Certainly the Department cannot be prevented from its obligation to free public lands from invalid claims merely because some private person will incidently benefit from such an action. This is true even though the invalidity of the claims is noted by such a person and he subsequently requests that the Government initiate contest proceedings. Assuming arguendo that the Government lacks the authority to initiate and maintain a contest for the use and benefit of a private person or corporation, the contestee has not shown that the instant contest proceedings are not in the public interest regardless of the fact that the Oroville-Wyandotte Irrigation District will benefit from the elimination of the claims.

Accordingly, the decision of the Hearing Examiner is affirmed.

Mrs. Patricia Lemoge Hudelson is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221 as amended. See the enclosed Form 4-1365. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The amount of the filing fee will be $5 for each mining claim for which favorable action is sought; a total of $25 if the appeal covers all of the claims included in this decision. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken the adverse party to be served will be:

Regional Solicitor
Department of the Interior
P. O. Box 21-4527
Sacramento 21, California

Assistant Director

Enclosure

DISTRIBUTION

Gilmore and Gilmore, Attorneys for the contestee (Certified Mail)
Office of the Regional Solicitor
Gower Federal Service
Division of Minerals (3)
Administrative Assistant, Hearings
Appeals List No. 1
LLM

Appeal to Sec
affirmed A-30191
11-2-63

DEPT. OF INTERIOR
SACRAMENTO, CAL.

OCT 24 10 00 AM 1963

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:
6.05c
California Contest
No. 6976

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

October 14, 1963

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DOCKET FILES

DECISION

United States	:	Involving the Ell placer mining
v.	:	claim. Situated in SW¼ Sec. 28,
E. M. Johnson,	:	T. 32 S., R. 38 E., M.D.M.,
William Kluss, Sr., et al.	:	Kern County, California

Decision Affirmed

Mr. E. M. Johnson and others have appealed from a Hearing Examiner's decision, dated February 20, 1963, declaring the above-identified placer mining claim null and void for lack of a discovery of a valuable mineral deposit as defined by the mining laws. 1/

The contestees contend that there was no jurisdiction to initiate the contest in the absence of a withdrawal of the land or an application for patent. It is, however, well settled that, until legal title to public land has passed to the claimant, the Secretary of the Interior may inquire into the validity of claimed rights to public land. Indeed, the Department of the Interior is charged with the responsibility of determining the validity of claims to public lands "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, 252 U.S. 450 (1920); Union Oil Company of California v. Udall, 289 F. 2d 790 (1961).

The contestees also contend that the Department has no power to nullify a mining claim merely because an application for public sale has been filed for the land embraced by the claim. There is no indication that this is the reason for the contest. It is true that paragraph 4 of the contest complaint states that public sale applications have been filed for the land, but this is not evidence that the land will be sold to the public sale applicants or to any other person. It should be remembered, however, that the Department may sell the land at some future date if it is found suitable for such disposition and it is determined that a transfer of ownership would be in the public interest.

1/ The contest complaint alleged: (1) "The land embraced within the claim is nonmineral in character," and (2) "Minerals have not been found within the limits of the claim in sufficient quantity to constitute a valid discovery." The Examiner did not rule on the first charge.

Next the contestees assert that the Examiner applied the wrong burden of proof; that the Government, as the moving party, had the burden of proof. This contention was rejected by the court in the case of Foster v. Seaton, 271 F. 2d 836, 837 (1959). In that case, the court held, in essence, that Congress did not intend to place on the Secretary of the Interior the burden of proving no valuable mineral deposits exist on a mining claim, and that the mining claimant, not the Government, is the "true proponent of a rule or order; namely, a ruling that they have complied with the applicable mining laws." It should be noted that in Foster v. Seaton, supra, as in the instant case, the mining claimants had not filed an application for patent.

In connection with their assertion that the hearing in the instant case did not conform to the Administrative Procedure Act (5 U.S.C. 1001 et seq.) the contestees assert that the Hearing Examiner is biased and involved in the investigative and prosecuting aspects of the case.

The Administrative Procedure Act provides that, "Subject to the civil service and other laws to the extent not inconsistent with the Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8 . . . ." (Emphasis added.) The legislative history of the Act clearly shows that although Congress intended internal separation within the Department of the investigative and prosecuting from the adjudicative functions, it did not intend the establishment of a separate administrative tribunal for conducting hearings and adjudicating matters in dispute. 2/

The Hearing Examiner who conducted the hearing in the instant case has been properly certified as qualified and competent by the Civil Service Commission in accordance with the Administrative Procedure Act. He had not participated in any way in the investigation or prosecution of the case, and the organization of the Department of the Interior does not make him subject to the Department's Solicitor or to any other person who has participated in the investigation or prosecution of this case. His independence is protected and guaranteed by the retention and promotion provisions of the Administrative Procedure Act.

On June 19, 1961, a Hearing Examiner issued two decisions, 3/ each of which contain the following paragraph:

> "Since Mr. Reece has admitted that he is the principal locator on an additional 300 or more associate placer claims upon which he holds

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2/ Rep. Atty. Gen. Comm. Ad. Proc. 55 (1941), S. Doc. No. 8, 77th Cong. 1st Sess. 55 (1941).

3/ United States of America v. Anita E. Spurrier et al., Contest Nos. 6874-77 (June 19, 1961), and United States of America v. Carter Christensen et al., Contest Nos. 6880-81 (June 19, 1961). These decisions were affirmed by the Director on September 15, 1961. United States v. Anita E. Spurrier et al, United States v. Carter Christensen et al., Los Angeles Contest Nos. 6874 etc. An appeal from the Director's decision is now pending in the office of the Secretary of the Interior.

> contracts with some 800 or more co-locators, it is recommended that the Bureau of Land Management charged with the disposition of public lands in the best interests of the general public, examine and investigate all such claims with a view towards testing their validity."

The contestees assert, in essence, that approximately 314 contests have been initiated in apparent compliance with the Examiner's recommendations in the above-identified decisions, and that this contest is one of that number as Mr. Reece is associated with the contestees. It concludes that, for this reason, the provisions of the Administrative Procedure Act relating to impartiality, has not been respected.

This assertion is not persuasive. The Examiner who heard the instant proceedings did not decide the Spurrier and Christensen cases, supra, and there is absolutely no evidence that he was involved in any way with those hearings. Nor is there any other indication that he was biased. The fact that he credited evidence favorable to the contestant and discredited evidence favorable to the contestees does not show he was biased. Cf. N.L.R.B. v. Howell Chevrolet Co., 204 F. 2d 79, 86 (1953).

The contestees have also attacked the standard of discovery applied by the Examiner. They state that his decision is based on the theory that there is no discovery unless the assay samples conclusively prove that a profit will be made, and that he applied the standard of "the prudent man" rather than "the man of ordinary prudence," which, they state, is a matter of substance and not merely semantics.

On page 4 of his decision, the Examiner states:

> "A valid discovery is one which would warrant a man of ordinary prudence in the further expenditure of his time and money with a reasonable prospect of success in an effort to develop a paying mine. Castle v. Womble, 19 L.D. 455 (1894); Chrisman v. Miller, 197 U.S. 313 (1905)." (Emphasis added.)

Nowhere in his decision does he state, or infer, that it is necessary to demonstrate that the deposit can be worked at a profit. It should, nevertheless, be remembered that, while a valuable mine need not be a profitable one, the actual evidence of value which sustains a discovery must be such that with actual mining operations, under proper management, a profitable venture may reasonably be expected to result. United States v. Fullinghim and Tinkle, A-28850 (September 18, 1962). It should also be noted that although the Examiner refers to a "prudent man" or "the prudent man rule" in several instances, it is obvious, when read in context with his statement of the rule on page 4 of his decision and his reference to Castle v. Womble, supra that he applied the concept of a man of ordinary prudence.

The contestees contend the rules of appellate procedure promulgated by the Secretary of the Interior violate the purpose of separation of functions of the Administrative Procedure Act and are violative of due process. This contention is also without merit. Section 8(a) of the Administrative Procedure Act, supra, provides for appeals from decisions issued by hearing examiners, and section 10(c) permits an agency to require parties to appeal from hearing examiners' decisions to the agency as a prerequisite to obtaining judicial review of the case. 4/

The contestees contend, in addition, that the cost of defending against contests, initiated "at the whim of the Bureau of Land Management," and which includes two successive administrative appeals, deprives, without due process of law, a locator of the right of free exploration, guaranteed by the mining laws of the United States.

That the defense of an unpatented mining claim against which contest proceedings are initiated may, at times, prove costly is conceded. The contention that contests are initiated at the "whim" of the Bureau of Land Management is, however, wholly unfounded. This attempt to impugn the good faith of the Bureau is not supported by one scintilla of evidence. To the contrary, adverse proceedings are initiated only after responsible officials have carefully studied the matter and are convinced that, to the best of their knowledge, the claim or claims to be contested do not meet the standards imposed by law. It should also be remembered that, even though the contested claim has been declared null and void, the contestees, like any one else, are free to explore for minerals and attempt to make a discovery so long as the land embraced by the claim remains available for mining location. United States v. New Park Mining Co. A-28530 (January 25, 1961).

Included in the contestees' appeal is the contention that the Examiner erroneously admitted into evidence and considered improper opinion testimony offered by the Government's mineral examiners. The examiners, by reason of their scientific, technical training and experience qualified as expert witnessess. The opinion testimony of each was based on facts within his own knowledge which were obtained from a personal examination of the claims, which each described in detail before giving his opinion. Such testimony is within the scope of the rules permitting opinion testimony by an expert witness. 20 Am. Jur. 787, 798. Moreover, the receipt of opinion evidence is not a violation of due process. Hyun v. Landon, 219 F. 2d 404 (1955). It should also be noted that the technical rules for the exclusion of evidence are not applicable to Federal administrative proceedings in the absence of a statutory requirement that such rules are to be observed. Opp.Cotton Mills v. Administrator, 312 U.S. 126, 155 (1941).

Among other minerals, the contestees contended that the Ell mining claim was validated by the discovery of a deposit of limestone suitable for

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4/ Sen. Rep. p. 27 H.R. Rep. pp. 43, 55, Fn. 21 (Sen. Doc. pp. 213, 277, 289).

for building stone purposes. The Examiner ruled that the limestone is a common variety as defined by the Act of July 23, 1955 (30 U.S.C., 1958 Ed. Sec. 601), and, therefore, not locatable after the date of that Act. 5/

In their appeal, the contestees contend that the limestone possesses distinct and special properties, such as an appearance on the cleaved face similar to travertine, and is suitable for cutting into blocks for building stone purposes. They also allege the deposit has characteristics giving it special economic value above and beyond the value of the normal limestone deposit. In support of their contention they cite the decision United States of America v. Kenneth McClarty, Washington Contest No. 4435 (September 24, 1962), which is currently before the Secretary of the Interior as a result of an appeal by the Forest Service, U.S. Department of Agriculture.

The McClarty case, supra is readily distinguishable from the instant proceedings. In the McClarty case, the mining engineers employed by the Forest Service and other witnesses testified that the stone located by McClarty had unique characteristics and that the deposit was rare. It was also established that some 322 tons of the stone had been sold between the time the claim was located and the hearing was held, slightly less than one year, at $45 per ton while common rock was selling at $6 to $7 per ton, evidencing that the stone had some property giving it distinct and special value. In the instant case, Mr. Fred S. Boyd, Jr., one of the contestant's witnesses, testified that the limestone on the claim resembles many deposits of limestone he had observed in Southern California and in other states; that there is nothing unusual or uncommon about it; and that it has no special physical or chemical properties which make it unusual (Tr. 25). He testified that one can find limestone similar in appearance, chemical composition, and weathering characteristics in any of the widespread occurrences of limestone in California and other western states (Tr. 30). Mr. Boyd also contacted several stone dealers, but found none who were interested in purchasing the limestone found on the Ell claim (Tr. 38). He testified that the limestone is suitable for use only as "rubble," 6/ as the limestone exposed shows much fracturing and jointing and occurs mostly in rather small blocks, which make it unsuitable for quarrying into larger blocks, and as most of the stone contains chert nodules, which make it difficult or unsuitable for polishing (Tr. 70-80). Mr. Joe Ostrenger testified that he leased the claim 18 months before the hearing (Tr. 133), during which time he had sold 45 tons of the limestone (Tr. 132), all of which was sold as rubble (Tr. 122) to one company (Tr. 133-134).

5/ The Ell placer mining claim was located September 17, 1957.
6/ Mr. Boyd defined "rubble" as "rock having one surface, which is relatively slabs but otherwise irregular in shape, and which is used in facing and walls and that sort of thing." (Tr. 70).

In view of the testimony, it is our opinion that the Examiner properly held the limestone found on the Ell placer mining claim to be a common variety within the meaning of the Act of July 23, 1955, supra, and not subject to location under the mining laws of the United States. Building stone which can be used only for the same purposes as other available building stone is a common variety even if it has special characteristics as they do not give it a special, distinct value. United States v. Kelly Shannon et al, A-29166 (April 12, 1963).

The contestees assert that the Examiner erred in failing to take judicial notice that the gold supply of the United States is being depleted at a rapid rate and that legislation is being proposed to either raise the price of gold or to give bonuses for the production of gold. The short answer to this is that it is irrelevant to the question of whether there exists on the claim a discovery of a valuable mineral deposit. A discovery must be shown as a present fact. Hence, a hope or expectation that the price of gold will be increased is not enough to validate a mining claim. Cf. United States v. Laura Duvall and Clifford R. Russell, 65 I.D. 458 (1958).

At the conclusion of their statement of reasons for appeal, the contestees state, without discussion, that the Examiner erred in his findings and conclusions based upon the evidence viewed as a whole. It is our opinion, however, that the evidence of record, which is thoroughly summarized in the Examiner's decision, is such that it can only be concluded that the Ell mining claim is null and void for lack of discovery. The contestees were unable to show that the gold, silver or mercury for which a discovery is claimed, exists on the claim in such quantity that a person of ordinary prudence would be justified in the expenditure of his time and money, with a reasonable prospect of success, in developing a valuable mine, or that the limestone found on the claim is an uncommon variety subject to location under the mining laws of the United States.

Accordingly, the Hearing Examiner's decision is affirmed.

The contestees are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See the enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington D.C. 20240. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken, the adverse party to be served will be:

Regional Solicitor
Department of the Interior
458 S. Spring Street
Los Angeles, California 90000

Acting Assistant Director

Enclosure

DISTRIBUTION:
Mr. Milton Wichner, Attorney for the contestees (Certified Mail)
Mr. E. M. Johnson
Mr. William Kluss, Sr.
Florence A. Berg
Mr. Ernest S. Fisher
Mr. Dale Nagel
Mr. John Fife
Pauline Fife
Mr. Emmett Strickland, Jr.
Gower Federal Service
Administrative Assistant, Hearings
Appeals List No. 1
LLM

DOCKET FILES

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
6.05c
Los Angeles 0162492

October 15, 1963

DEPT. OF INTERIOR
SACRAMENTO, CAL

OCT 24 10 00 AM 1963

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Mrs. Barbara R. Gale : Sodium

Decision Affirmed

Mrs. Barbara R. Gale has appealed from a decision of the Riverside land office dated January 28, 1963, which required her to submit revised application forms, pay the first year's advance rental, and post a bond within 30 days from notice of the decision, under penalty of final rejection of her sodium prospecting permit application as to the 800 acres remaining therein. The application was made under the Mineral Leasing Act, as amended, 30 U.S.C., sec. 261, and the requirements were made pursuant to regulations 43 CFR 195.8(g)(2), 195.8(h) and 195.10, effective September 19, 1961 (Circ. 2066, 26 Fed. Reg. 7775, August 19, 1961).

The record shows by land office decision Loren W. Kent et al., Los Angeles 0153751, etc., dated April 22, 1960, the appellant's application was rejected in its entirety on the basis of Geological Survey records indicating that the lands had no prospective value for sodium prospecting. On appeal therefrom the decision was vacated by Bureau decision of September 30, 1960, pursuant to a supplemental report of the Geological Survey which indicated that while the classification did not warrant modification, there would be no objection to the issuance of a sodium prospecting permit for those portions of the lands applied for which did not conflict with pending desert land entries. The Bureau decision was affirmed on appeal to the Department, and the cases were remanded for issuance of a permit on the remaining lands. Barbara R. Gale, A-28725 (August 30, 1961).

As to the additional requirements, the appellant contends in substance that her application was filed under the old regulations, before the amended regulations took effect, with the understanding that the permits sought would be issued in conformity with the terms of the then existing regulations; and, further, that there are no indications in the amended regulations that they are to be applicable retroactively to applications filed prior to the effective date of the amended regulations. She requests in effect that a permit be issued under the terms of the regulations in effect on the date the application was first filed. The appellant also asserts error in that part of the decision appealed from which stated the case had been closed as to lands in the offer which had been in conflict with desert land entries. She states since the conflicting desert land entries have been cancelled that the sodium permit applied for should cover all the lands described in her offer as originally filed.

Under the Mineral Leasing Act, supra, the Secretary of the Interior is authorized to issue sodium prospecting permits under such rules and regulations as he may prescribe. Hence, it was within the scope of his authority to amend the pertinent regulation and increase the obligations of applicants for sodium permits by making the fulfillment of additional requirements a condition precedent to the issuance of a permit. Cf. Roy W. Swenson et al., 67 I.D. 448 (1960). The mere filing of an application for a sodium permit does not vest in the applicant any rights which preclude consideration of his application under regulations adopted after such filing. Further, the revised regulations prescribe the conditions which are to attend the issuance of permits in all cases and thus govern land office action in response to all applications considered after the revised regulation became effective, specific language therein also indicating the applicability of the revised regulations to pending applications.

With respect to the appellant's contention that the permit sought should cover all lands described in the original offer, the Department's decision, affirming the rejection of the application as to lands within the pending desert land entries, became final, as noted in the land office decision of January 28, 1963. Hence, the lands are no longer included in the application here concerned. The appellant is at liberty to file a new application for these lands, if she so desires, which application would be subject to any valid, intervening applications for the same lands.

Accordingly, the decision appealed from is affirmed.

Mrs. Gale is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral
Leasing Appeals
Division of Appeals

Enclosure

DISTIRBUTION:

Mrs. Barbara R. Gale (Certified Mail)
Division of Minerals (3)
Conservation Division, Geological Survey (3)
Gower Federal Service, Boulder, Colorado
Appeals List No. 1
DWG

appeal to Sec

DOCKET FILES

In reply refer to:
6.05c
Sacramento PL 11-46 (M:JS)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

November 12, 1963

Certified Mail
Return Receipt Requested

DECISION

R. D. Compton and
Edna A. Compton
: Verified Statement (Public Law 167)

Decisions Vacated

R. D. and Edna A. Compton have appealed from a decision of the Chief, Minerals Section, Sacramento, California, Land Office, dated June 26, 1963, insofar as it rejects their verified statement as to the Bullion Extension No. 1 Mine, Bullion Extension No. 2 Mine, California Boy Mine, Fraction Mine, Bullion Northwest Extension No. 3 Mine, and California Girl Mine, all unpatented mining claims in Sec. 24, T. 20 N., R. 11 E., and Sec. 19, T. 20 N., R. 12 E., M.D.M.

An examination of the record discloses that in the decision R. D. Compton and Edna Compton, 70 I.D. 12 (1963), the Department rejected the verified statement in question as to the above-identified claims, and three others, because the Comptons did not designate the sections in which the claims are located as required by Section 5(a) of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 613(a)). 1/ The Department held, at pages 14 and 15:

> "The language of the statute declaring that a verified statement 'shall set forth' the designation of the sections of public land, which makes possible a simple check with the land listed in the published notice to mining claimants, is clearly mandatory. * * * The mining claimant is required to offer a statement which meets statutory requirements and the land office is not at liberty to accept an incomplete statement which does not meet these requirements * * *. The land office should have rejected the appellant's incomplete statement * * *." (Emphasis added.)

1/ The Comptons' verified statement included 11 unpatented mining claims. The Department found that the location of only two of the claims was adequately stated.

Notwithstanding the above-cited decision, the Chief, Minerals Section, Sacramento, California, Land Office, issued, on May 23, 1963, a decision in which he allowed the Comptons 30 days to designate the section, township, and range in which each of the claims is located. On June 11, 1963, the Comptons filed three "Amended" Verified Statements, which resulted in the issuance of a second decision, the decision of June 26, 1963, from which the Comptons have appealed.

The Department's decision R. D. Compton and Edna Compton, supra, is an unqualified rejection of the verified statement in question as to the nine mining claims identified in that decision, which includes the six mining claims involved in the instant case. That decision was the Department's final administrative determination. The Chief, Minerals Section, Sacramento Land Office, was therefore, without authority to reconsider the verified statement and issue his decisions of May 23 and June 26, 1963.

It is true that the Department has held that the Bureau of Land Management may decide, on a discretionary basis, whether to allow or deny a request to correct a verified statement which has been timely filed and which sets forth the information required by statute. Mr. and Mrs. Ted R. Wagner, 69 I.D. 186 (1962). The Department declared, however, on page 190 of the Wagner decision, that the conclusion reached therein should "not be taken as holding that a verified statement can be amended after the expiration of the 150-day period to include information required by the statute which was not included in the statement as originally filed." The Department specifically held in the Compton decision that, as to nine of the eleven claims, the original verified statement did not include the information required by statute, that it was "incomplete," and rejected it for that reason.

Accordingly, the decisions of the Chief, Minerals Section, Sacramento Land Office, dated May 23 and June 26, 1963, are vacated, and the Comptons' verified statement stands rejected as to the nine claims designated in the Department's decision R. D. Compton and Edna Compton, supra.

R. D. and Edna A. Compton are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See the enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D.C., 20240. The amount of the filing fee will be $5 for each claim for which favorable action is sought; a total of $45 if the appeal covers the nine claims for which the verified statement has been rejected. In taking an appeal there must be strict compliance with the regulations. In the event an appeal is taken, the appellants will have the burden of proving, by presenting substantial affirmative evidence, that this decision is erroneous.

John B. Piccolo

Chief, Branch of Mining and
Grazing Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Mr. W. I. Follett, Attorney for the Appellants (Certified Mail)
R. D. and Edna A. Compton
Regional Forester, Forest Service, U. S. Department of Agriculture
Gower Federal Service
Division of Minerals (3)
Appeals List No. 1
LLM

appeal to Sec
affirmed A-30205
11-27-64

DOCKET FILES

DEPT. OF INTERIOR
SACRAMENTO, CAL.
NOV 22 10 09 AM 1963
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:
6.05c
Sacramento Contest
No. 062057

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D. C. 20240

November 18, 1963

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States,
Contestant,

v.

James E. Hubbart,
Contestee.

Involving the Lucky Strike,
Big Buck and Hospital lode
mining claims; situated in
Secs. 20 and 21, T. 45 N.,
R. 7 W., M.D.M., Siskiyou
County, California

Decision Affirmed

Mr. James E. Hubbart has appealed from a Hearing Examiner's decision, dated June 18, 1963, declaring null and void the above-identified lode mining claims and rejecting the contestee's patent application. The Examiner held that the contestee had submitted no evidence to show mineral values of rock in place as required by the mining laws of the United States. He also held that the evidence shows that any valuable minerals that may have previously existed on the claims have been exhausted.

We have thoroughly reviewed the evidence submitted at the hearing, which has been summarized in the Examiner's decision and need not be repeated here. Our analysis of this evidence compels us to agree with the Examiner that the contestee has failed to show that a discovery of a valuable mineral deposit exists on any of the contested lode mining claims. Even if it is assumed, arguendo, that valuable deposits of gold have been discovered in the past and that the dump found on the Lucky Strike claim may now contain a substantial amount of recoverable gold, the fact remains that the contestee has been unable to show that there exists on any of the claims a vein or lode of quartz or other rock in place carrying gold or some other valuable mineral in such quantity that a man of ordinary prudence would be justified in the expenditure of his time and money in an effort to develop a valuable mine. In the absence of such a showing, the contestee's patent application must be rejected and the contested mining claims must be declared null and void. Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912); United States v. Carlile, 67 I.D. 417 (1960). This was pointed out by the Examiner, as was the fact that a discovery must be shown as a present fact. United States v. Margherita Logomarcini, 60 I.D. 371 (1949).

The contestee's appeal, which is devoted almost entirely to a discussion of the potential of the dump on the Lucky Strike claim, has been carefully considered. Nothing contained there justifies, however, a reversal of the Examiner's decision. The fact remains that the contestee has not shown the existence of mineralized rock in place, without which his lode claims cannot be valid.

Accordingly, the Examiner's decision is affirmed.

Mr. James E. Hubbart is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See the enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington D.C. 20240. The amount of the filing fee will be $5 for each claim for which favorable action is sought; a total of $15 if the appeal covers all of the claims included in this decision. In taking an appeal there must be strict compliance with the regulations.

In the event an appeal is taken, the adverse party to be served will be:

Regional Solicitor
U.S. Department of the Interior
P.O. Box 21-4527
Sacramento, California

S. Hoffman
Assistant Director

Enclosure

DISTRIBUTION:
Mr. Hereford T. Fitch, Attorney for the contestee (Certified Mail)
Mr. James E. Hubbart
Gower Federal Service
Division of Minerals (3)
Administrative Assistant, Hearings
Appeals List No. 1
LLM

appeal to Sec.
affirmed A-30223
11-29-65

DOCKET FILES

DEPT OF INTERIOR
SACRAMENTO, CAL.
DEC 6 2 25 PM 1963
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:
6.05c
Sacramento Contest No. 039707
December 3, 1963

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

Certified Mail
Return Receipt Requested

DECISION

United States,
Contestant,
v.
Ed Jaensch and
Leona Jaensch,
Contestees.

Involving the Silver King lode mining claim; situated in Sec. 8, T. 31 N., R. 5 W., M.D.M., Shasta County, California.

Decision Affirmed

Ed and Leona Jaensch have appealed from a Hearing Examiner's decision, dated July 15, 1963, declaring null and void for lack of discovery the above-identified lode mining claim.

The contestees, who made no appearance at the hearing, contend on appeal that the Examiner's decision is insufficient to adjudicate the issues raised by the complaint and answer, and that such failure renders the decision invalid.

Two issues were raised by the contest complaint and the answer filed in response thereto: (1) whether or not a valid discovery exists on the claim, and (2) whether or not the claim is being used for purposes other than mining.[1] It is true that the Examiner's decision does not decide both of these issues. It does, however, decide the controlling issue, the question of discovery. As the Examiner found that there is no discovery on the claim, it was unnecessary for him to rule on the second of the issues stated above.[2]

---

[1] The Examiner's decision erroneously states that the contest complaint charges the land embraced by the claim is nonmineral in character and not that the claim is being used for purposes other than mining. As the Examiner limited his decision to the issue of discovery, which is controlling, it is our opinion that this error does not require its invalidation.

[2] A discovery is essential in order to create valid rights or initiate a title as against the United States. Until such a discovery is made, a claimant is merely a licensee or tenant at will of the United States. Union Oil Co. v. Smith, 249 U.S. 337, 346 (1919).

The contestees contend that the Examiner's decision is unconstitutional and invalid as it denied them the due process of law guaranteed by the Fifth Amendment because the Department of the Interior and Bureau of Land Management have not complied with the provisions of the Administrative Procedure Act, supra, in the appointment of Hearing Examiners. This contention is without merit.

The Administrative Procedure Act, supra, provides that, "Subject to the civil service and other laws to the extent not inconsistent with the Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8 . . ." (Emphasis added.) The legislative history of the Act clearly shows that, although Congress intended internal separation within the Department of the investigative and prosecuting from the adjudicative functions, it did not intend the establishment of a separate administrative tribunal for conducting hearings and adjudicating matters in dispute.[3]

In the instant case, the Hearing Examiner who conducted the hearing and issued the decision from which the contestees have appealed has been properly certified as qualified and competent by the Civil Service Commission in accordance with the Administrative Procedure Act. He had not participated in any way in the investigation or prosecution of the case, and the organization of the Department of the Interior does not make him subject to the Department's Solicitor or to any other person who has participated in the investigation or prosecution of this case. His independence is protected and guaranteed by the retention and promotion provisions of the Administrative Procedure Act.

The contestees' contention that the Department of the Interior has failed to publish its rules of procedure as required by the Administrative Procedure Act, and that such rules are mostly contained in a book of rules not open to public inspection, is likewise without merit. The Department's rules of practice for appeals and contests, including contests of mining claims, have been duly published in the Federal Register and are also published in 43 Code of Federal Regulations, Part 221.

The contestees also contend that a discovery has been made on the claim in the past, that they have done all the assessment work required to maintain the claim, and that they will be able to prove the existence of valuable minerals when they are able to pump out the water that now fills the main shaft. It is well settled, however, that a mining claim must be shown to be mineral in character and valuable for its mineral content as a present fact; that is, a discovery must be shown to exist on the claim at the time its validity is challenged.[4] The fact that a claimant may have consistently completed assessment work does not excuse him from showing the existence of a present discovery.5/

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[3] Rep. Atty. Gen. Comm. Ad. Proc. 55 (1941), S. Doc. No. 8, 77th Cong. 1st Sess. 55 (1941).

[4] United States v. Humbolt Placer Mining Company, et al. A-28754 (July 31, 1962).

All of the evidence of record has been carefully reviewed. It is our opinion that it clearly shows that no discovery exists on the contested claim.

Accordingly, the Examiner's decision is affirmed.

The contestees are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See the enclosed Form 4-1365. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken, the adverse party to be served will be: Regional Solicitor, U. S. Department of the Interior, P.O. Box 21-4527, Sacramento, California 95821.

In the record is a letter dated November 27, 1962, in which the contestees express their desire to purchase, under the provisions of the act of October 23, 1962 (76 Stat. 1127), the five acres of land upon which they have erected certain improvements and their willingness to waive whatever rights they may have had to the balance of the land in the claim. The contestees were subsequently advised by the Bureau's State Director that their request would not be considered at that time because regulations to implement the Act had not been issued. Nothing further was done in connection with the Jaenschs' request. For this reason, when this decision becomes final, the case record will be remanded to the Bureau's California State Director in order that a determination may be made as to what, if any, relief may be granted to the contestees under the provisions of the act of October 23, 1962, supra (43 CFR Part 260).

L. T. Hoffman
Assistant Director

Enclosure

5/ Cole v. Ralph, 252 U.S. 286 (1920).

DISTRIBUTION
Ed and Leona Jaensch (Certified Mail)
Mr. Jerrald K. Pickering, Attorney at Law
Gower Federal Service
Division of Minerals (3)
Administrative Assistant, Hearings
Appeals List No. 1
LLM

appeal to Sec
affirmed A-30217
12-29-64

DOCKET FILES

DEPT. OF INTERIOR
SACRAMENTO, CAL.

DEC 6 2 29 PM 1963

BUREAU OF LAND MANAGEMENT
LAND OFFICE

In reply refer to:
6.05c
Sacramento Contest No. 056599

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

December 3, 1963

Certified Mail
Return Receipt Requested

DECISION

United States,
Contestant,
v.
David L. King and
Kathryn King

Involving the Amy-K placer mining claim, situated in Sec. 3, T. 22 N., R. 11 E., M.D.M., Plumas County, California.

Decision Affirmed

David L. and Kathryn King have appealed from a Hearing Examiner's decision, dated July 24, 1963, declaring null and void for lack of discovery the above-identified placer mining claim.

In their appeal, the contestees contend, in essence, that the contestant's mineral examiner did not properly examine the claim or take representative samples of the material found thereon, that they have maintained the claim and carried out the required assessment work, and that it will not be necessary to expend large sums of money to develop the claim as it can be economically worked on a small scale. They also contend that the Examiner's discussion of the law is wholly incorrect.

We have carefully reviewed the hearing transcript and find that the Examiner's decision contains an accurate summary of the testimony given during the course of the hearing. This testimony need not be repeated at length here, but it is noteworthy, in view of the contestees' contentions in their appeal, that Mr. Sanborn, who examined the contested claim with Mr. King, testified that he sampled every place Mr. King referred to optimistically or indicated was a satisfactory place (Tr. 14). The evidence of record leads us to conclude that the Examiner properly held that the evidence fails to show a discovery exists on the contested claim.

Contrary to the contestees' contentions, the Examiner's decision does contain a proper discussion of the law pertinent to this case. The Examiner correctly pointed out that no mining claim is valid in the absence of a discovery [1], that a discovery must be more than insignificant bits of mineral [2], and that

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[1] 30 U.S.C., 1958 ed., Secs. 22 and 35.

[2] United States v. Frank J. Miller, 59 I.D. 446 (1947).

DOCKET FILES

In reply refer to:
6.05c
Sacramento 075330

December 10, 1963

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

DECISION

Southport Land and Commercial Company : Request for equitable adjudication of California Coal Cash Entry No. 13.

Request Denied

The Southport Land and Commercial Company, hereinafter referred to as Southport, successor in interest of the Black Diamond Coal Mining Company, hereinafter referred to as Black Diamond, has filed a request for an equitable adjudication that it is, by virtue of Coal Entry No. 13, entitled to a patent for the N$\frac{1}{2}$ Sec. 8, T. 1 N., R. 1 E., M.D.M., in Contra Costa County, California.

The history of the N$\frac{1}{2}$ of Section 8 is thoroughly discussed in a Mineral Report prepared as a result of Southport's request for equitable adjudication. This report states, among other things, that coal was discovered and mined in the area as early as 1855, but that no formal claim was made for this tract until 1860, when the Cumberland Coal Company was formed by Francis L. Such and others to mine coal in Section 8. In June 1860 Mr. Such located the NW$\frac{1}{4}$ of Section 8 for coal under a California law dated April 20, 1852.[1] In July 1860, a Mr. Noah Norton located the NE$\frac{1}{4}$ of Section 8 under the same law. According to the Mineral Report, a title search revealed that Southport's claim to the land stems from these two claims.[2]

---

[1] The validity of this law was challenged and it is no longer effective according to the report.

[2] The Report states that the chain of title from 1860 to 1867, when Black Diamond acquired its interest in the land, is not complete. It states that there are many quit claim deeds for a part interest in the land from persons who were not previously found in the chain of title, and, in many instances, there are no deeds from persons who were in the chain of title to Black Diamond.

The report continues that on May 13, 1865, Frank Bernard, as an officer of Black Diamond, filed an application with the State of California to have the N½ of Section 8 located and sold as lieu lands under the provisions of a State law of April 27, 1863.3/ Location was made on June 30, 1865, for the use of Bernard which was approved by the State Surveyor General on August 11, 1865. The application was never perfected, however, as Bernard failed to pay for the land.

On August 23, 1868, one John Mullan made application to the State Surveyor General for the purchase of the N½ of Section 8, under the same law that Bernard had made his application. The application was accepted, and, on May 21, 1869, a Certificate of Purchase was delivered to Mullan.

Subsequently, a suit was brought by Mullan and his partner, Avery, to evict Black Diamond from the land and, still later, a separate damage suit was brought by Mullan and Avery for damages for the coal Black Diamond had mined from the land. As a result, Black Diamond sought, through the Attorney General's Office, to have the State selection set aside. The matter was ultimately decided in favor of Black Diamond by the Supreme Court of the United States. The Court held that coal lands are mineral lands within the meaning of that term as used in the statutes regulating the disposition of the public domain so that the State of California could not, under the provisions of Section 7 of the act of March 3, 1853 (10 Stat. 244), select coal lands. It held that the selection and listing of known coal lands could be set aside in a suit in equity brought by the United States, which would vacate the title of the State and of those claiming under it.

Cash Coal Entry No. 13 was filed by Black Diamond, under Sections 2347 throug 2352 Revised Statutes (30 U.S.C.A. 71 *et seq.*), on April 25, 1883, at which time $3,200, $10 per acre for the 320 tract, was submitted. The application was rejected and cancelled by the Commissioner of the General Land Office on May 7, 1883, because the *Mullan* case, *supra*, was still pending before the Supreme Court. Subsequently, in a letter dated July 8, 1886, the Assistant Commissioner of the General Land Office informed the Register and Receiver in San Francisco that Black Diamond should be allowed to make entry "*upon proper application* and showing compliance with the laws regulating the sale of coal lands and the regulations established thereunder." (Emphasis added.) He told the Register and Receiver that the purchase price of the land would be $20 per acre, not $10, because the land was within 15 miles of a completed railroad, but that this amount would have to be paid in full by Black Diamond

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3/ The law was titled "An act to provide for the sale of certain lands belonging to the State," and was issued under the authority of the act of March 3, 1853 (10 Stat. 244), which provides for in lieu selections of public lands by States.

4/ *Mullan* v. *United States*, 118 U.S. 271 (1886).

as a credit could not be allowed for the $3,200 previously submitted. He stated that Black Diamond could make application for a repayment of the $3,200 previously submitted.5/ He also told the Register and Receiver that Black Diamond would have to file a certified list of its stockholders showing the capacity of each to enter the land. Black Diamond did not, however, file another application, request that its application of April 25, 1883, be recognized, or take any other action toward the perfection of the entry within the one year period prescribed by law.6/

The Mineral Report states that in 1887 the N½ of Section 8 was sold to the State of California for delinquent taxes for the years 1886 and 1887. In 1890 the Southport Land and Commercial Company was formed as a subsidiary of Black Diamond. Shortly after its organization, Southport bought from Black Diamond the N½ of Section 8 and other lands, obtaining a quit claim deed from Black Diamond for the lands. Later, in June 1900, Southport redeemed the N½ of Section 8.

In 1959 Black Diamond absorbed its subsidiary and adopted its name.

Southport and its predecessor, Black Diamond, were in undisputed possession of the land from at least 1886 to 1961, except for the short time it was sold to the State for delinquent taxes, and have paid all local tax assessments since 1900. Officers of Southport have stated that their Company was under the impression that a patent had been issued for the N½ of Section 8 years ago, and that they did not know it was public land until told so by the Shell Oil Company in 1961.

Southport now seeks an equitable adjudication that it is entitled to a patent to the N½ of Section 8 pursuant to the provisions of 43 U.S.C. 1161 through 1163, and the pertinent regulations issued by the Department of the Interior, 43 CFR Part 107. 7/

5/ There is no record that a refund was either requested or made.

6/ The law reads, in part, as follows:

> "* * * all persons claiming under section 72 of this title shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant." (30 U.S.C.A. 74).

7/ 43 U.S.C. 1161 provides:

> "The Secretary of the Interior, or such officer as he may designate, is authorized to decide upon principles of equity and justice, as recognized in courts of equity, and in accordance with regulations to be approved by the Secretary of the Interior, consistently with such principles, all cases of suspended entries of public lands and of suspended preemption land claims, and to adjudge in what cases patents shall issue upon the same. (Emphasis added.)

The Leasing Act of February 25, 1920 (41 Stat. 437; 43 U.S.C.A. 181 et seq.) authorizes the disposition of certain classes of mineral lands of the United States, including coal lands, by the Secretary of the Interior only by lease. "After the Leasing Act, coal lands of the United States were subject to disposition by the Secretary only by lease 'except /under section 37/ as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.'" Work v. Braffet, 276 U.S. 560, 564 (1928).

In the instant case, it is our opinion that Coal Cash Entry No. 13 was not a valid claim existent at the date of the Leasing Act of February 25, 1920, supra, as it had been cancelled outright by the Commissioner of the General Land Office on May 7, 1883, and never thereafter perfected. The Secretary of the Interior is, therefore, precluded by the Leasing Act from reinstating and giving favorable consideration to the Entry. Section 37 of the Act contains the only exception to its operation as wholly superseding the operation of the prior law.8/

An additional point is worthy of note here. The Mineral Report states that by 1886 most, if not all, of the coal had been mined from the N$\frac{1}{2}$ of Section 8. Assuming this to be so, even at the time Black Diamond was invited to submit an application for entry under the coal laws the land was no longer valuable for such deposits.9/ Thus, the claim could not have been perfected in compliance with the coal laws.

Accordingly, Southport's request for a patent to the N$\frac{1}{2}$ Sec. 8, T. 1 N., R. 1 E., M.D.M. is denied.

This decision is the final administrative determination in this matter.

Charles H Stoddard
Director

Approved: January 15, 1964

Assistant Secretary of the Interior

8/ It should be noted that Section 2 of the Leasing Act authorizes the Secretary of the Interior to recognize and consider the equitable rights of those who have, in good faith, improved and occupied or claimed coal lands, but only in connection with the issuance of coal leases.

9/ To be subject to disposition under the coal land laws, lands had to contain 'workable' deposits; that is, coal in such quantity and of such quality as would warrant a prudent coal miner or operator in the expenditure and labor incident to the opening and operation of a coal mine or mines on a commercial basis." Samuel D. Pulford et al., 45 L.D. 494, 499 (1916).

DISTRIBUTION:

McLeod and McLeod, Attorneys for Southport
Southport Land and Commercial Company
Steve and Beverly Kosanke
Gower Federal Service
Division of Minerals (3)
Appeals List No. 1
LLM

appeal to Sec
Reversed & Remanded
A-30231 - 12-29-64

DOCKET FILES

In reply refer to:
6.05c
Los Angeles Contest
No. 0170935-C-38

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

December 20, 1963

Certified Mail
Return Receipt Requested

DECISION

United States,
Contestant :
v. :
Don Brunkalla
Roxanna M. Welton :
Peggy Holcomb
John R. Robinson,
Contestees :

Involving the John R
placer mining claim;
situated in Sec. 26,
T. 30 S., R. 39 E.,
M.D.M., Kern County
California

Decision Affirmed

Roxanna M. Welton and Don M. Brunkalla have appealed from a Hearing Examiner's decision, dated August 12, 1963, declaring null and void the above-identified placer mining claim. The Examiner held that the claim lacks a valid discovery of a valuable mineral deposit within the meaning of the mining laws of the United States.

The record shows that, although the contestees' attorney was notified of the time and place of the hearing, neither he nor any of the contestees made an appearance. The contestant's witness, after qualifying himself as an expert in his field, testified that he had examined the contested claim in detail, taken 21 representative assay samples, and had concluded, on the basis of the information he had gathered, that the evidence of mineral values found on the claim was not sufficient to justify a person of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

In their appeal, the contestees state simply that they have taken several samples from the claim, which were tested by a qualified laboratory, and that the samples contained mineral values in sufficient amounts that a person of ordinary prudence would be justified in developing the claim.

We have carefully reviewed the evidence of record, summarized in the Examiner's decision, and find that his analysis of the facts and applicable law is correct. The contestees' unsupported assertion that the claim contains valuable mineral deposits provides no basis for modifying the decision.

Moreover, it should be noted that, in accordance with Section 7 of the Administrative Procedure Act (5 U.S.C. 1006), the Department's rules of practice provide that where "a hearing has been held in a contest the record made shall be the sole basis for decision except to the extent official notice may be taken of a fact as provided in section 221.100."[1] Thus, the contestees may not, in an appeal, submit evidence which should have been submitted at the hearing.

Accordingly, the Examiner's decssion is affirmed.

The contestees are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See the enclosed Form 4-1365. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the contestees will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

In the event an appeal is taken, the adverse party to be served will be:

Regional Solicitor
United States Department
of the Interior
458 S. Spring Street
Los Angeles, California

Assistant Director

Enclosure

DISTRIBUTION

Miss Roxanna M. Welton (Certified Mail)
Mr. Don Brunkalla (Certified Mail)
Miss Peggy Holcomb (Certified Mail)
Mr. John R. Robinson (Certified Mail)
Gower Federal Service
Division of Minerals (3)
Administrative Assistant, Hearings
Appeals List No. 1
LLM

---

[1] 43 CFR 221.99(c).

DOCKET FILES

In reply refer to:
6.05c
Sacramento 073688-TT

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1963 DEC 30 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

December 20, 1963

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

David S. Peters : Verified Statement
:
:
Decision Affirmed

Mr. David S. Peters has appealed from a decision of the Sacramento land office dated July 8, 1963, rejecting a verified statement filed pursuant to the Act of July 23, 1955 (30 U.S.C., sec. 601), as to his two unpatented mining claims situated in Trinity County, State of California. The verified statement was rejected because it was not filed within the 150-day period following first publication of notice to mining claimants as required by the Act.

The appellant does not dispute the untimely filing but he seeks to excuse it by relating that his papers were at his ranch situated some 35 miles from Eureka where he works; that his ranch is at times inaccessable due to snow, and that there is no notary in the vicinity.

The record shows that certain lands in the Trinity National Forest in which the mining claims of the appellant are situated, were listed in connection with a request for publication of notice to mining locators, or any persons claiming under them, by the Forest Service, U.S. Department of Agriculture, under the provisions of Section 5(a) of the act of July 23, 1955, supra. The notice was first published on January 3, 1963 and the 150-day period within which verified statements were required to be filed expired on June 3, 1963. The appellant's unnotarized statement was received on June 18, 1963.

Since the appellant failed to submit the verified statement within 150 days of the date of first publication as required by the Act, the statement was not filed as required and was properly rejected. Mena Mining and Exploration Company, 66 I.D. 228 (1959).

Both the Bureau of Land Management and the claimant are bound to observe the above cited law as it is written. Hence, as the claimant has failed to meet the requirements of the law, the Bureau is without authority to waive the consequences. Hines Gilbert Gold Mines Co., 65 I.D. 481 (1958).

Accordingly, the decision appealed from is affirmed.

Mr. David S. Peters is allowed the right of appeal to the Secretary of the Interior, in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington D.C. 20240, and the amount of the filing fee will be $5 for each mining claim or a total of $10 if both mining claims are included in the appeal. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

John B. Piccolo
Chief, Branch of Mining
and Grazing Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Mr. David S. Peters (Certified Mail)
Forest Service, Division of Recreation and Land Uses, U.S.D.A. (8)
Office of the General Counsel, Division of Forestry and Lands, U.S.D.A.
Division of Minerals
Gower Federal Service
Appeals List No. 1
EG

DOCKET FILES

Sacramento Contest No. [illegible]

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

[illegible]

DECISION

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[illegible]
[illegible]
[illegible]

[illegible]

Motion for Reports of
Mineral Investigation Denied

The attorney for the contestees in this case requested that he be provided with copies of reports of the mineral examinations conducted by Bureau of Land Management mining engineers of the claims in contest. This request was refused by the [illegible] Manager on the grounds that disclosure of the reports would be prejudicial to the interest of the Government, whereupon he renewed his request to the Director, Bureau of Land Management.

The report of examination of a mining claim prepared and submitted by the mining engineer is a compilation of his findings, interpretations, opinions, conclusions, and recommendations, and, as such, must be regarded as the expression of an employee to his superior. It is in the nature of a staff recommendation, and is in no way a part of the record by which the right to a patent for any particular tract of public land is established or defeated. [illegible] The report is not [illegible] evidential weight [illegible] the rights of [illegible] [illegible] 1 [illegible]. The hearing examiner who decides the validity or invalidity of [illegible] mining claims, never sees the report.

be filed with the Director, Bureau of Land Management, Washington D.C. 20240, and the amount of the filing fee will be $5 for each mining claim or a total of $10 if both mining claims are included in the appeal. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of showing, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Chief, Branch of Mining
and Grazing Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Mr. David E. Peters (Certified Mail)
Forest Service, Division of Recreation and Land Uses, U.S.D.A. (2)
Office of the General Counsel, Division of Forestry and Lands, U.S.D.A.
Division of Minerals
[illegible] District
Appeals Desk No. 1
DM

appeal to Sec
Reversed & Remanded
A-30253
6-22-65

DOCKET FILES

DEPT. OF INTERIOR
SACRAMENTO, CAL.
JAN 23 10 00 AM 1964
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

Sacramento Contest No. 10-2110

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

January 7, 1964

DECISION

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Herbert H. Blakemore :
Barry E. Froman : Mining
Margaretta W. Marker :

Request for Reports of Mineral Investigation Denied

The Attorney for the Contestees in this case requested that he be provided with copies of reports of the minerals examinations conducted by Bureau of Land Management mining engineers on the claim in contest. His request was refused by the Acting Land Office Manager on the grounds that disclosure of the reports would be prejudicial to the interest of the Government, whereupon he resubmitted his request to the Director, Bureau of Land Management.

The report of examination of a mining claim prepared and submitted by the mining examiner is a compilation of his findings, interpretations, opinions, conclusions, and recommendations, and, as such, must be regarded as the expression of an employee to his superior. It is in the nature of a staff recommendation, and it is not a part of the record by which the right to a patent for any particular tract of public land is established or defeated. Comm. Ltr. 38 L.D. 464 (1908). The report is not evidence and cannot be given evidential weight as against any rights or claims asserted by the entryman. George F. Goodwin, 43 L.D. 193 (1914); Richard P. Ireland, 40 L.D. 484, (1912). The Hearing Examiner who decides the validity or invalidity of contested claims, never sees the report.

The Bureau of Land Management and its predecessor, the General Land Office, have ruled consistently since October 16, 1908, that reports of investigations may be held in confidence. Comm. Ltr., supra. In view of the long standing practice of treating as confidential the reports of field examiners of the Bureau of Land Management, a request to permit an examination of such a report will be denied. Ohio Oil Co., et al., v. Kissinger, et al., 60 I.D. 324 (1949); William Barnett, et al., Colo. Contests Nos. 36 and 38 (1958). Reports of field examiners are for administrative use only and are not for public inspection. Miriam M. Nicholl, et al., Los Angeles 088885 (July 15, 1959). Furthermore, the Department adheres to the view that investigative reports may be kept confidential in the exercise of the privilege of the executive to keep from public examination certain documents when it believes it is in the public interest to do so. Julius S. Foster, et al., A-28252 (January 25, 1961).

The claimant's attorney urges disclosure of the reports for the reason that the claim has been inundated by Trinity Lake, and it is impossible for the Contestees to make independent mineral reports and investigations. He states that the reports, if furnished, will be studied by a mining engineer retained by the Contestees and by Contestee Herbert H. Blakemore, who himself is a mining engineer, and that the two engineers will then make a physical inspection of the surrounding area and make such tests as they consider necessary or desirable. It is the obligation of Bureau of Land Management field examiners to verify a discovery, and not to make a discovery nor to assist the claimant in his exploration. It is the mining claimant who is presumed to know the locus, nature and extent of his alleged discovery.

The regulation of the Department of the Interior (43 CFR, Part 2) and the pertinent provisions of the Administrative Procedure Act (60 Stat. 238, Sec. 3(c)) deal with the availability of official records. It might well be said that reports of mineral examinations are not a part of the official record of the case as they are not rendered in compliance with any law or regulation, have no legal significance, and, except for reasons of administrative convenience, might be oral rather than written. However, pro arguendo, we will consider the report to be a part of the official record.

The well established right of the Bureau of Land Management to decline disclosure of confidential reports has been confirmed by the Administrative Procedures Act, supra, which provides, in essence, that matters of official record are to be made available in accordance with the rules issued by the agencies, except information held confidential for good cause. The rule followed by the Bureau of Land Management is expressed by regulation (43 CFR 2.2), which confers on the custodian of the official record the responsibility of determining whether its disclosure would be prejudicial to the interests of the Government. In fulfilling this responsibility the Manager determined that the disclosure of the mineral reports in the case at hand would be prejudicial to the interests of the Government, and, upon review, we concur.

The action of the Acting Manager in holding the reports confidential was proper, and the subsequent request for access thereto is hereby denied.

Herbert H. Blakemore, Barry E. Froman and Margaretta W. Marker are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 2.2(b) and 43 CFR Part 221, as amended. See enclosed Form 4-2365. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington 25, D. C. 20240, and the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

H.R. Hochmuth

Associate Director

DISTRIBUTION:
Mr. Jess D. Cannan, Attorney (Certified Mail)
Gower Federal Service, Boulder, Colorado
Office of the General Counsel
U. S. Department of Agriculture
Division of Minerals (20)
(Mining Contests Cases) (1)
Appeals List No. 1

appeal to Sec
affirmed A-30256
4-21-65

(n)

In reply refer to:
6.05c
Sacramento Contest No. 5910

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

January 10, 1964

Certified Mail
Return Receipt Requested

DECISION

United States, Contestant, v. Robert Hight and R. L. Coons, Contestees	:	Involving the Rich Cliff Nos. 1, 2 and 3 lode mining claims; situated in the S½ Sec. 30, T. 34 N., R. 1 W., M.D.M., Shasta County, California

Decision Affirmed

Robert Hight and R. L. Coons have appealed from a Hearing Examiner's decision, dated July 5, 1963, declaring null and void the above-identified lode mining claims for the reason that a discovery of a valuable mineral has not been made upon any of the claims.

The contestees assert that the Examiner's findings of fact are not supported by the record, and that his statement of the law does not pertain to the true facts of the case. They state that the Examiner's conclusions are not justified when considered in the light of the true over-all facts, and that he could not have considered all of the evidence adduced at the hearing.

We have considered each of the specific arguments the contestees have made in their appeal. After reviewing the entire record we find that none of these arguments provides any basis for modifying the Examiner's decision.

That the contestees, particularly Mr. Hight, may be practical miners, with experience in prospecting and developing mining claims, does not require that Mr. Hight's testimony be given more weight than that of the contestant's expert witness. The weight of evidence and the credibility of witnesses are matters primarily within the province of the Examiner. 1/

1/ Compare the Bureau's decision United States v. Leo E. Shoup, Contest Nos. Arizona 10426 and 10427 (February 15, 1963).

We have carefully reviewed the hearing transcript and find that the Examiner's decision contains an accurate summary of the testimony given during the course of the hearing and that it contains a proper discussion of the law pertinent to the facts of this case. Even though the claims may have been physically located (monumented), the Examiner correctly held that no mining claim is valid in the absence of a discovery 2/, that a discovery must be more than the disclosure of insignificant bits of mineral 3/, and that a discovery exists only where the evidence of minerals found "is of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine * * *." 4/ The Examiner also held that a hope or expectation, based upon a general belief, that value will increase at depth is not sufficient to validate a claim 5/, and that geological inference, however strong, cannot be substituted for a discovery. 6/ It should, in addition, be emphasized that the willingness of a claimant to spend his time and money in an effort to develop a claim is no substitute for a valid discovery. Nor does the finding of minerals in sufficient quantity and quality to induce a prudent person to undertake further exploration in the hope of uncovering greater values constitute a discovery. 7/

The Examiner also correctly held that a mining claimant must keep his discovery points in such a condition that the Government may confirm the existence of the discovery, and that the Government has no obligation to go beyond the discovery points designated by the claimant and try to make a discovery for him. 8/ In this connection, the contestees state in their appeal that certain road work conducted under the auspices of the United States destroyed "the" discovery pit so that only vestiges of it remained. The testimony of Mr. Hight and Mr. Murphy indicates, however, that the

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2/ 30 U.S.C., 1958 ed., Secs. 22 and 35.

3/ United States v. Frank J. Miller, 59 I.D. 446 (1947).

4/ Castle v. Womble, 19 L.D. 455 (1894).

5/ United States v. Duvall and Russell, 65 I.D. 458 (1958).

6/ United States v. Robert G. and Orpha B. McMillan, A-29456 (July 26, 1963).

7/ United States v. Ben Fullingim and John Tinkle, A-28850 (September 18, 1962).
United States v. Jesse Shackleford et al., A-28788 (August 15, 1962).

8/ United States v. Lem A. and Elizabeth D. Houston, 66 I.D. 161 (1959).

pit had been rehabilitated and that it was designated by the claimants as the point of discovery. It is significant that the contestant's expert witness, who examined the three claims was unable to find more than one pit, and that contestees were unable to show that discovery pits exist on the Rich Cliff Nos. 2 and 3 claims. It is also significant that assays of samples taken from the pit on the Rich Cliff No. 1 claim show little or no valuable mineral.

Accordingly, the Examiner's decision is affirmed.

The contestees are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See the enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240. The amount of the filing fee will be $5 for each claim for which favorable action is sought; a total of $15 if the appeal covers all of the claims involved in this decision. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken, the adverse party to be served will be:

Regional Solicitor
U. S. Department of the Interior
P. O. Box 21-4527
Sacramento, California 95821

L. Hoffman
Assistant Director

Enclosure

DISTRIBUTION
Mr. Alvin M. Cibula, Attorney for the Contestees
Mr. Robert Hight
Mr. R. L. Coons
Gower Federal Service
Administrative Assistant, Hearings
Division of Minerals (3)
Appeals List No. 1
LLM

appeal taken
affirmed A-30249
4-19-65

In reply refer to:
8.05c
Sacramento Contest
No. 072079

January 10, 1964

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

DECISION

United States, :
Contestant, :
: Involving the Thomas placer mining claim; situated in Sec. 28, T. 33 N., R. 9 W., M.D.M., Trinity County, California
v. :
:
John T. Collier and :
Doris M. Coonrad, :
Contestees. :

Decision Affirmed

John T. Collier and Doris M. Coonrad have appealed from a Hearing Examiner's decision, dated August 2, 1963, declaring null and void the above-identified placer mining claim. The Examiner held that a discovery of a valuable mineral such as would satisfy the mining laws of the United States has not been made within the limits of the claim.

We have carefully reviewed the Examiner's findings of fact, his conclusions of law, and the appellants' reasons for appeal in light of the evidence compiled at the hearing and the mining laws of the United States. This review compels us to conclude that the Examiner did not err and that, for the reasons stated therein, his decision must be affirmed.

It should be emphasized that geological inference, however strong, cannot be substituted for the discovery of valuable mineral deposits within the limits of a mining claim. United States v. Frank J. Miller, 59 I.D. 446 (1947); United States v. John R. and Pearl S. Dodson, A-27905 (July 31, 1959). Moreover, evidence that might encourage further prospecting is not a discovery. United States v. Harold Ahlstrom, A-28490 (December 16, 1960). Nor can it be said that the willingness of a mining claimant to spend his time and money in an effort to develop a claim is, of itself, the discovery contemplated by the mining laws of the United States. United States v. Ben Fullingim and John Tinkle, A-28850 (September 18, 1962). The objective standard of the "prudent man" 1/ test is used in order to achieve valid determinations of whether the requirements of the mining laws have been met in any given case. United States v. Richard L. and Nellie V. Effenbeck, A-29113 (January 15, 1963).

It should also be emphasized that a mining claimant must keep his discovery points in such a condition that the Government may confirm the existence of the discovery, and that the Government has neither the obligation nor the responsibility to go beyond the discovery points designated by the claimant and try to make a discovery for him. United States v. Lem A. and Elizabeth D. Houston, 66 I.D. 161 (1959).

1/ See Castle v. Womble, 19 L.D. 455 (1894).

Much of the appellants' statement of reasons is devoted to a discussion of the economics of developing and working the contested claim. It is noteworthy that the Examiner did not hold that the appellants needed to show that the claim could be worked at a profit in order to establish a discovery. Indeed, the Department has held that the "valuable mine" referred to in Castle v. Womble, supra, need not be a profitable mine, but that the evidence of value which sustains a discovery must be such that with actual mining operations under proper management a profitable venture may reasonably be expected to result. United States v. Santiam Copper Mines, Inc., A-28272 (June 27, 1960).

As no discovery has been made on the Thomas placer mining claim, it is in fact invalid. Nevertheless, so long as the land remains open to mining location, the appellants, like anyone else, are free to attempt to make a valid discovery on the land and a new location. Until discovery, however, they have no more than the right of pedis possessio enunciated in Union Oil Co. v. Smith, 249 U.S. 337 (1919). United States v. New Park Mining Co., A-28530 (January 25, 1961).

Accordingly, the Examiner's decision is affirmed.

Mr. Collier and Mrs. Coonrad are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See the enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

In the event an appeal is taken the adverse party to be served will be:

Regional Solicitor
U.S. Department of the Interior
P. O. Box 214527
Sacramento, California

Assistant Director

Enclosure

Dist. on page 3

DISTRIBUTION:

Mr. Warren L. Coonrad, Attorney in fact for Doris M. Coonrad (Certified Mail)
Mrs. Doris M. Coonrad
Mr. John T. Collier (Certified Mail)
Gower Federal Service
Division of Minerals (3)
Administrative Assistant, Hearings
Appeals List No. 1
LLM

appeal to Sec
affirmed A-30267
5-11-65

DOCKET FILES

DEPT. OF INTERIOR
SACRAMENTO, CAL.

FEB 10 10 00 AM 1964

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:
6.05c
Contest No. R-0616
(Riverside)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

January 30, 1964

Certified Mail
Return Receipt Requested

DECISION

United States,
Contestant
v.
John L. Cooper, Claudine E. Cooper, Jesse G. Womack, and Louise D. Womack,
Contestees

: Gold Bug Nos. 1, 2, and 3, and Flouncy Flossy Lode Mining Claims; Canyon View Placer Mining Claim; and Flouncey Flossy and Three Bugs Mill Sites; situated in NW¼ Sec. 19, T. 1 N., R. 3 W., S.B.M., California

Decision Affirmed

The above-named contestees have appealed from a decision of a hearing examiner, dated July 12, 1963, declaring the Gold Bug Nos. 1, 2, and 3, and Flouncy Flossy lode mining claims; Canyon View Placer mining claim; and Flouncey Flossy and Three Bugs mill sites null and void. The mining claims were held to be invalid for want of discovery of a valuable mineral deposit within the limits of each claim. The invalidity of the mill sites was based upon a finding that they were not being used or occupied for mining and milling purposes.

The record shows that the mining claims and mill sites involved were located in 1960 and are situated in the NW¼ of Sec. 19, T. 1 N., R. 3 W., S.B.M., California, which is within the San Bernardino National Forest.

The complaint, dated March 22, 1962, charged as to the mining claims that the land is nonmineral in character within the meaning of the mining laws, and that a discovery of a valuable deposit of locatable mineral does not presently exist within the limits of the mining claims; and as to the mill sites that they are not being used or occupied for mining, milling, processing or beneficial purposes in connection with a vein, lode or placer deposits and that the mill sites have no quartz mill, reduction, processing or beneficial works thereon. A hearing was held on November 27, 1962.

First we will consider the procedural matters raised on appeal.

The appellants refer to the hearing examiner's denial of their motion to dismiss the contest proceedings and again assert that the Forest Service, U. S. Department of Agriculture, did not have authority to initiate the contest complaint and to prosecute the case at the hearing as the land involved is not in a national forest. At the hearing they offered in evidence a copy of a letter from the Acting Commissioner of the General Land Office notifying the Register of the land office at Los Angeles, California, that the withdrawal of the lands in Sec. 19, T. 1 N., R. 3 W., S.B.M., for forest ranger station purposes by the order of January 18, 1907, was revoked on May 2, 1929, upon the recommendation of the Secretary of Agriculture.

The contest complaint shows that it was issued in the name of the United States of America by the Manager, Riverside Land Office, Bureau of Land Management.

The records of the Bureau of Land Management show that the lands here involved are within the exterior boundaries of the San Bernardino National Forest. Prior to the creation of the forest preserve, they had passed into private ownership but were reconveyed to the United States in 1904, under the exchange provisions of the act of June 4, 1897 (30 Stat. 36). Upon acceptance and approval of the title to the reconveyed lands, they became public lands. Lafayette Lewis, 33 L. D. 43 (1904). At that time they became subject to the mining laws and regulations as other public domain lands within the national forest (Cf. 40 Op. Att. Gen. 260 (1943)), except during the period the lands were withdrawn for a ranger station site, and were open to mining location when the claims involved were located.

The appellants' reason for believing that the lands embraced by the mining claims are no longer within the national forest is unclear. Perhaps they are under the mistaken view that the revocation of the withdrawal for the ranger station site removed it from the national forest. This view is not correct because land may be included in several withdrawal orders each for a different purpose and the revocation of any one withdrawal order will not affect the other withdrawals. P & G Mining Co., 67 I.D. 217 (1960). Although the lands involved on and after May 2, 1929, no longer were reserved for a ranger station site, they remained within the national forest and still are. Certainly, the Forest Service, U. S. Department of Agriculture, could properly recommend to the Bureau of Land Management the initiation of adverse proceedings against the subject mining claims. It was also proper for the Department of Agriculture to prosecute the matter pursuant to the 1957 Memorandum of Understanding between the Bureau of Land Management and the Forest Service implementing regulation 43 CFR Part 205, authorizing the Forest Service to contest mining claims located on national forest lands.

The second contention of procedural error raised on appeal is that examination of the witness for the contestees by the hearing examiner placed the examiner in the role of prosecutor and judge.

This precise matter is considered in the Attorney General's Manual on the Administrative Procedure Act--1947, at page 72, wherein it is stated that "The second sentence of section 7(a) provides that 'The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner.' This means, of course, that 'They must conduct the hearing in a strictly impartial manner, rather than as the representative of an investigative or prosecuting authority, but this does not mean that they do not have the authority and duty - as a court does - to make sure that all necessary evidence is adduced and to keep the hearing orderly and efficient.' Sen. Rep. p. 21, H.R. Rep. p. 34 (Sen. Doc. pp. 207, 268). This is not intended to prohibit a hearing officer from questioning witnesses and otherwise encouraging the making of a complete record." We have reviewed the record made at the hearing and conclude that the hearing examiner questioned the witnesses in order to clarify the testimony and thereby made a complete record.

The contestees claim discoveries of gold, silver, rare earths and decomposed granite on the mining claims.

On appeal it is contended, in substance, that a discovery of valuable deposits of locatable minerals has been made within the limits of the mining claims for the following reasons: (1) section 3 of the act of July 23, 1955 (Pub. Law 167; 30 U.S.C., sec. 611) states, "'Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such deposit'"; (2) section 4 of the same act (30 U.S.C., sec. 612) provides that "'Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting . . .'", which provision, it is asserted, is in itself sufficient for the mining claims to be held for the purpose of prospecting; and (3) the testimony of the geologist for the contestees that the gold and silver values were in the sample he took from the lode and outcroppings on the lode (Tr. 98), other testimony that granite had been sold for $1.75 per ton and that rare earths and other minerals yet to be explored substantiate the validity of the mining claims.

In regard to the appellants' second substantive contention, we can only assume that the inference intended is that so long as they are prospecting on the mining claims the validity of those claims may not be challenged by the Government. This contention has no merit. Under the mining laws of the United

States, one may take possession of vacant public land open to location under those laws and, after filing notice of location, retain possession against all except the Government while he is in diligent prosecution of his efforts to discover valuable mineral therein. He is not regarded as a trespasser because he is on the land with the tacit consent of the Government. However, when the Government withdraws that consent by the institution of adverse proceedings against the claims, the mineral claimant must show that he has made a discovery of valuable mineral deposits within the limits of each mining claim in order to retain his possession. United States v. Foster, 65 I.D. 1 (1958).

We have carefully reviewed the record made at the hearing and must conclude that the hearing examiner's finding was correct that the decomposed granite found on the mining claims is of widespread occurrence and is a common variety of material not locatable under the mining laws after the passage of the act of July 23, 1955, supra. Consequently, as these mining claims were located after the passage of that act, the contestees in order to prevail had the burden of showing by a preponderance of evidence (Foster v. Seaton, 271 F.2d 836 (1959)) that the other minerals asserted are present within the limits of each mining claim in sufficient quantity and quality to constitute a valid discovery under the ordinary prudent man test laid down in Castle v. Womble, 19 L.D. 455, 457 (1894), expressly approved by the United States Supreme Court in Chrisman v. Miller, 197 U.S. 313, 322 (1905).

We concur in the hearing examiner's finding that the gold values were insufficient to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success, in developing a valuable mine. Moreover, there is no evidence that any specific vein or lode of mineral-bearing rock in place is exposed on any of the lode claims. The geologist for the contestees, who admitted that he did not examine the Canyon View placer claim, but alleged that he examined all the other claims, testified that the sample which had gold and silver values was taken by him from a lode claim. He was unable to identify the specific lode claim from whence it came. Nor was he able to recollect how the sample was taken, the width of the vein, or the nature of the improvement. (Tr. 86, 92, 94, 98-100.) Assay reports without other evidence are insufficient to establish the validity of a mining claim. United States v. Northern Pacific Railway Co., 1 F.2d 53 (1924).

The appellants' statement of reasons for their appeal admits that the rare earths claimed are yet to be explored. The record made at the hearing amply supports that admission as well as the hearing examiner's finding that the contestees have failed to identify any specific valuable rare earth on the mining claims which might have value for mining purposes.

This leaves for consideration the two mill sites.

The testimony adduced at the hearing reveals that one mill site is graded for a mill site; the other is graded for a road; and neither mill site is otherwise used. (Tr. 17-21, 47-48, 64.) Since there are no quartz mills or reduction works on the mill sites, they cannot be valid under the second provision of the statute creating such claims. (30 U.S.C., 1958 ed., Supp. IV, sec. 42.) Also, it is clear that the appellants are not using the mill sites for mining, milling, processing, beneficiation, or other operations in connection with a valid lode or placer mining claim and, therefore, they do not come within the comprehensive terms of the other provisions of that statute, as amended. (30 U.S.C., 1958 ed., Supp. IV, Sec. 42a and 42b.) *United States v. Duvall and Russell*, 65 I.D. 458 (1958); *United States v. S.M.P. Mining Co.*, 67 I.D. 141 (1960).

Accordingly, the decision of the hearing examiner declaring the Gold Bug Nos. 1, 2, and 3, and Flouncy Flossy lode mining claims; Canyon View Placer mining claim; and FlounceyFlossy and Three Bugs mill sites invalid is hereby affirmed.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for *each* mining claim and mill site included in the appeal. If the appeal covers all mining claims and mill sites adversely affected by this decision the total filing fee is $35.00. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

If an appeal is taken the adverse party to be served is:

Office of the General Counsel
U. S. Department of Agriculture
25 Taylor Street, Room 624
San Francisco, California 94102

L. T. Hoffman
Assistant Director

Enclosure

DISTRIBUTION

John L. Cooper and Claudine E. Cooper (Certified Mail)
Jesse G. Womack and Louise D. Womack (Certified Mail)
Office of the General Counsel, U. S. Dept. of Agriculture,
  San Francisco, Calif.
Regional Forester, U. S. Dept. of Agriculture, San Francisco, Calif.
Forest Service, Division of Recreation and Land Uses, U. S. Dept.
  of Agriculture, Washington, D. C.
Office of the General Counsel, Division of Forest and Lands,
  U. S. Dept. of Agriculture, Washington, D. C.
Division of Minerals (3)
Administrative Assistant, Hearings
Gower Federal Service
Appeals List No. 1
WHW

DOCKET FILES

DEPT OF INTERIOR
SACRAMENTO, CAL.
MAR 2 10 00 AM 1964

BUREAU OF
LAND MANAGEMENT

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

In reply refer to:
6.05c
Sacramento 068467-LLL
068467-MM

February 25, 1964

Certified Mail
Return Receipt Requested

DECISION

Leonard Crumpton : Verified Statements
:
:

Decision Affirmed

Mr. Leonard Crumpton has appealed from separate decisions of the Sacramento land office dated December 17, 1963, rejecting his verified statements filed pursuant to the Act of July 23, 1955 (30 U.S.C., sec. 601), as to four unpatented mining claims situated in Siskiyou County, California. The verified statements were rejected because they were not filed within the 150-day period following first publication of notice to mining claimants as required by the Act.

The appellant did not dispute the untimely filing, but stated that he did not file verified statements within the time limit required on the advice of his attorney that it was not necessary to file such statements to hold surface rights on unpatented mining claims located prior to July 23, 1955. He advised that he does wish to hold the surface rights on these claims.

The record shows that certain lands in the Klamath National Forest, California, in which the mining claims of the appellant are situated, were listed in connection with a request for publication of notice to mining locators, or any persons claiming under them, by the Forest Service, U.S. Department of Agriculture, under the provisions of the Act of July 23, 1955, supra. The notice was first published on December 20, 1961, and the 150-day period within which verified statements were required to be filed expired on May 19, 1962. The appellant's statements were received on November 26, 1963.

Since the appellant failed to submit the verified statements within 150 days of the date of first publication as required by the Act, the statements were not filed as required and were properly rejected. Mena Mining and Exploration Company, 66 I.D. 228 (1959).

Both the Bureau of Land Management and the claimant are bound to observe the above-cited law as it is written. Hence, as the claimant failed to meet the requirements of the law, the Bureau is without authority to waive the consequences. Hines Gilbert Gold Mines Co., 65 I.D. 481 (1958).

It should be emphasized that the appellant's failure to timely file verified statements does not invalidate his mining claims. He has not lost any of his mining rights, including the surface rights necessary for mining or his right to patent if he satisfies the requirements of the mining laws of the United States. What has happened is that the United States has obtained the right to manage and dispose of the vegetative surface resources and to manage other surface resources on the claims until such time as they may be patented.

Accordingly, the decision appealed from is affirmed.

Mr. Crumpton is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington D.C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision the total filing fee is $20. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

John B. Piccolo
Chief, Branch of Mining
and Grazing Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Mr. Leonard Crumpton (Certified Mail)
Forest Service, Division of Recreation and Land Uses, U.S.D.A. (16)
Forest Service, Division of Forestry and Lands, U.S.D.A.
Division of Minerals
Gower Federal Service
Appeals List No. 1
AHO

DOCKET FILES

In reply refer to:
6.05c
Sacramento 076410(A)
February 26, 1964

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DEPT. OF INTERIOR
SACRAMENTO, CAL.
MAR 2 10 00 AM 1964
BUREAU OF LAND MANAGEMENT
LAND OFFICE

DECISION

Gilbert C. Wedertz : Verified Statement
:
:
Decision Affirmed

Mr. Gilbert C. Wedertz has appealed from a decision of the Sacramento land office dated January 9, 1964, which rejected and declared ineffective, in part, his verified statement filed pursuant to the Act of July 23, 1955 (30 U.S.C., sec. 603), as to the Sheepherder tunnel site location. The decision held in effect that the act cited is not pertinent to a mining tunnel located under the provisions of section 2323, Revised Statutes (30 U.S.C. 27), since this statute does not provide for possession of any surface area on the basis of location or claim of a tunnel site, nor does it provide for the patenting of such a location or claim.

The appellant contends he finds nothing in the law to authorize such a decision; that for this purpose a tunnel site is a mining claim under the Act of July 23, 1955, which does not limit its provisions to claims which may be patented; and that the regulation 43 CFR 185.21 confirms the mining claim character of a tunnel site. He points out the need of a certain amount of surface in connection with mining operations; however, that the surface is of little importance in this instances since it is void of soil and timber.

The contentions of the appellant concerning the scope of the law and regulations cited cannot be substantiated. Section 4 of the Act of July 23, 1955, is self-limiting to mining claims that may lead to patent as shown hereinafter:

> "Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto. (Underscoring supplied).
>
> "Mining claims located prior to the date of the act will be subject to the act where determination has been made pursuant to section 5 of the act, that the locator's surface rights are limited as provided in section 4 of the act . . . ."

The regulation 43 CFR 185.21 does not confirm the mining claim character of a tunnel site; it merely outlines the possessory right of a tunnel proprietor. A tunnel site cannot be considered as a mining claim since it merely confers exclusive rights to all previously undiscovered lodes which may be found as a result of the driving of a tunnel along the line of the tunnel site. The tunnel site is a line and not an area over which a claimant may exercise rights of control, which is emphasized in the fact that a tunnel site is not patentable.

Therefore, the decision appealed from is affirmed.

Mr. Gilbert C. Wedertz is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

John B Piccolo
Chief, Branch of Mining
and Grazing Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Mr. Gilbert C. Wedertz (Certified Mail)
Regional Forester, Forest Service
Division of Minerals
Gower Federal Service
Appeals List No. 1
AHO

DOCKET FILES

In reply refer to:
LA-0168748 (1233073),
LA-0170937 (1233074),
and LA-0170928 (1233086)

DEPT. OF INTERIOR
SACRAMENTO, CAL.
APR 6 10 00 AM 1964
BUREAU OF
LAND MANAGEMENT

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

February 28, 1964

DECISION

Kern County Land Company : Mining

Application for Reformation
of Mineral Patents Rejected

Kern County Land Company has applied to the Director for the reformation of three mineral patents, embracing a total of 13 lode claims within the boundaries of Death Valley National Monument, so as to delete from each of these patents the reservation to the United States of leasing act minerals. The applicant asks, alternatively, that supplemental patents be issued without a reservation of leasing act minerals in favor of the United States.

The report of the mineral examination by the valuation engineer (mining), rendered pursuant to the applications for patent, noted the presence of the sodium borate materials ulexite and probertite, raising a question as to whether these minerals were locatable or leasable. A report on the lands by the Geological Survey, dated July 11, 1963, stated that the leasable mineral sodium was known to be present as probertite and ulexite, but that the grade was too low to permit classification as sodium land for underground mining, but that it met the quality standards for classification as sodium lands for strip mining. The report advised that the standards for the classification of sodium lands was being revised; that when the revision of the standards was complete, the subject lands would, in all probability, be classified as valuable for sodium. In the interim the lands would be regarded as prospectively valuable for sodium. Moreover, by this same report, the Geological Survey reported the lands to be prospectively valuable for oil and gas.

Accordingly, the three patents issued with a reservation to the United States of all leasing act minerals in accordance with the provisions of the act of August 13, 1954 (68 Stat. 708; 30 U.S.C. 521).

The attorney for the applicant offers two principal contentions in support of the application, which we will treat individually.

First, the applicant urges that the law under which the Director purports to act does not apply to Death Valley lands because section 4 of the act of August 13, 1954, supra, provides that a reservation of leasable minerals shall be made "where the lands are subject to disposition under the mineral leasing laws," but that the

1933 Death Valley Mining Act did not extend the mineral leasing law to Death Valley lands and that the Director was therefor without power to impose the reservation. (Quotation from applicant's brief in support of application - emphasis supplied.) However, this proposition is predicated on language which is not precisely that employed in the wording of the statute, which reads, in pertinent part, as follows:

> ". . . and any patent issued for any such mining claim or millsite shall contain such reservation as to, but only as to, such lands covered thereby which at the time of the issuance of such patent were . . .
>
> * * * * * * *
>
> "(c) known to be valuable for *minerals subject to disposition under the mineral leasing laws*." (Emphasis supplied)

It would seem apparent from the clear language of the statute that the reservation is mandatory if the land is known to be valuable for *minerals* which are of the kind subject to disposition under the leasing laws, and the fact that the *land* involved happens not to be subject to disposition under the mineral leasing laws is a matter of no significance. However, the applicant cites some legislative history of the statute which is strongly indicative of the fact that it was the intention of at least some members of Congress to enact a law which would require a reservation of leasing act minerals only if the mining claims were located on public lands to which the mineral leasing acts were applicable at the time the patent issues.

Despite the persuasive quality of the legislative history offered by the applicant, it may not be employed to contravene the meaningful wording of the statute. Legislative history serves only to clarify the intent of the Congress in those instances where the law is ambiguous and may reasonably be interpreted in more than one way. We find no such ambiguity in the provision cited. Further, it would be manifestly impossible for an executive agency to attempt to administer the legislative intent in preference to the enacted law in those cases where the law is so clearly stated.

The second argument advanced by the applicant in support of reformation of the patents is that the lands patented to the Kern County Land Company by these instruments were not known to be valuable for leasing act minerals but were merely reported by the Geological Survey to be valuable prospectively for oil and gas and valuable prospectively for sodium.

The applicant states that the terms "known to be valuable" and "valuable prospectively" do not mean the same. However, an exploratory venture into the field of semantics may be avoided by an examination of the report itself. The final paragraph of the report, *en toto*, is as follows:

> The leasable mineral, sodium, is known to be present as probertite and ulexite on the land involved in the subject application but the grade is too low to permit classification as sodium land for underground mining *but it meets the quality standards for classification as sodium land for strip mining.* Moreover, our standards for the classification of lands valuable for sodium are currently being revised and when the revision is complete the subject land will, in all probability, be valuable for sodium. Therefore, all of the land described in the subject application is, at this time, considered to be valuable prospectively for sodium. (Emphasis supplied.)

Despite the fact that the author of the above report failed to supply either a negative or an affirmative reply to the question, "Are these lands known to be valuable for sodium?," the question is answered by the information that the leasable mineral, sodium, is present in the lands and it meets the quality standards for classification as sodium land for strip mining. Without making an effort to distinguish between the terms "valuable" and "valuable prospectively," it is readily apparent that the land is known to have value for its sodium and that the quality of the sodium is such as will support a classification "as sodium land for strip mining." With this information before us, the statutory obligation to impose the reservation of minerals subject to the leasing acts is inescapable.

This decision constitutes the final administrative determination by the Department in this matter. 43 CFR 221.31.

Irving Senzel

Acting Assistant Director

Approved: March 18, 1964
(Date)

John A. Carver Jr.

Assistant Secretary of the Interior

DISTRIBUTION
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1225 19th Street, N.W.
Washington, D.C. (Certified Mail) 20036
Kern County Land Co.
Minerals - 10 copies
Appeals List No. 1
Case Files - 1 copy

DOCKET FILES

DEPT. OF INTERIOR
SACRAMENTO, CAL.

APR 29 10 09 AM 1964

BUREAU OF
LAND MANAGEMENT

In reply refer to:
6.05c
Sacramento 068434
072878

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

April 22, 1964

Certified Mail
Return Receipt Requested

DECISION

Moab Drilling Company, Inc.
Permit Applicant
- Appellant

Mineral Permit Application
(Acquired Lands)

Reno Silica Company
Lease Applicant

Decision Modified

The Moab Drilling Company, Inc., has appealed from a decision of the Sacramento land office dated May 9, 1963, rejecting its above-identified mineral prospecting permit application, filed pursuant to regulations contained in 43 CFR Part 3220, 29 F.R. 4550 - 4555, March 31, 1964 (formerly 43 CFR 200.31 - 200.51), as to the $W\frac{1}{2}SE\frac{1}{4}$ sec. 10, T. 20 N., R. 17 E., M.D.M., California. The described land, included in mineral lease application Sacramento 072878 of the Reno Silica Company, was rejected from the permit application on the basis of a determination by the Geological Survey that this land should be offered for lease of the silica deposits therein by competitive bidding. The Moab Drilling Company, Inc., was granted a prospecting permit for gold, silver, copper and lead as to the other lands sought in its application.

The appellant contends, in substance, that it wishes only to prospect for gold, silver, copper and lead, that its application predates others by several months, and that it should not be forced into bidding for a mineral in which it has no interest.

In a supplemental report dated October 29, 1963, the Geological Survey states that since the silica in the land described is an outcrop deposit and is mined as such, the mining of same would not interfere with the prospecting for gold, silver, copper and lead on the same land. The report states that the silica deposit occurs in a pegmatite dike, which has intruded granitic rocks, and that there is no sign of mineralization in the deposits except minor showings of copper which appear as stains on the quartz. The report further shows that the deposits extend into the parcel of land in question not in excess of 200 feet. The Geological Survey reports that a lease for the gold, silver, copper and lead could be issued if valuable deposits of these minerals are discovered and that it will have no technical objection to the issuance of a lease for silica and a prospecting permit for the named minerals where, as in this situation, no conflict exists. The Geological Survey therefore recommended as to the lands applied for under Sacramento 072878 that the lands be segregated as a leasing unit for silica only, and offered for lease by competitive bidding, under certain terms and conditions, and as to the permit application, that a permit be issued for prospecting for gold, silver, copper and lead, on the same land, specifically excluding the silica.

An applicant for prospecting permit acquires no vested right in the land described in his application or in the mineral deposits therein by the filing of his application, and a permit is not authorized for deposits which are valuable and as to which prospecting or exploratory work is not necessary. Claude P. Heiner, 70 I.D. 149 (1963).

It is considered in the circumstances here concerned that the granting of a lease for the development and production of the silica deposits will not preclude the issuance of the requested permit for the same land for prospecting for the minerals named by the permit applicant, with suitable stipulations for simultaneous operation and for exclusion of the silica.

In view of the foregoing when this decision becomes final the records will be remanded to the land office, through our State Director for California, for further appropriate action consistent herewith. The stipulation referred to should be executed by the permit applicant prior to issuance of the requested permit on the land. For failure to execute the stipulations as required, the permit application should be finally rejected without further notice.

The decision appealed from is modified as indicated herein.

The Moab Drilling Company, Inc., is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840, 29 F.R. 4326, March 31, 1964 (formerly 43 CFR Part 221). See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

If an appeal is filed the adverse party to be served is:

Reno Silica Company
470 Court Street
Reno, Nevada 89500

Frances A. Patton

Chief, Branch of Mineral
Leasing Appeals
Division of Appeals

Enclosure

DISTRIBUTION:

Moab Drilling Company, Inc.   (Certified Mail)
Reno Silica Company
Division of Minerals (3)
Geological Survey, Conservation Division (6)
Chief, Branch of Mining, Conservation Division, Geological Survey (11)
Gower Federal Service
Appeals List No. 1
AHO

DOCKET FILE

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1964 MAY 15 AM 10 00

In reply refer to:
6.05c
Sacramento 073688-UU
May 7, 1964

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D. C. 20240

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Bertha Carlson, :
Administratrix of the Estate : Verified Statement
of Clyde E. Moser :
:
:

Decision Affirmed

Bertha Carlson, Administratrix of the Estate of Clyde E. Moser, has appealed to the Director, Bureau of Land Management from a decision of the land office at Sacramento, California, dated August 12, 1963, rejecting the verified statement filed on behalf of the decendent's estate pursuant to the act of July 23, 1955 (30 U.S.C. sec. 613 et seq. (1958)), because it was not filed within the 150-day period following the publication of a notice to mining claimants as required by the act.

The notice to mining claimants was first published on January 3, 1963. The 150th day following first publication was June 2, 1963, a Sunday. Therefore, the last day for timely filing a verified statement was Monday, June 3, 1963. The Administratrix filed a verified statement on July 29, 1963. 1/

The appellant alleges that Clyde E. Moser, the mining claimant, died on November 3, 1962; that she was appointed Administratrix of the decedent's estate on December 21, 1962; that she is unfamiliar with mining matters and in particular the notice to mining claimants published on January 3, 1963; that she resides some 125 miles from the county in which the notice was published; and that the contents of the publication were not called to her attention until a date too late to comply with the requirement of the notice.

While through a combination of circumstances the appellant was not able to file the verified statement within the 150 days prescribed, the requirement of the act is mandatory and there is no provision for waiver. The Bureau has no alternative but to apply the law as enacted and the verified statement must be rejected as untimely. Hines Gilbert Gold Mines Company, 65 I.D. 481 (1958); Mary Martinez, A-29776 (September 18, 1963).

1/ The verified statement listed 12 mining claims. The appellant's letter transmitting the notice of appeal and filing fee stated that it covered 7 mining claims without identifying them.

Furthermore, the verified statement is also subject to rejection because it was not verified under oath. The Department has ruled that the verified statement which section 5 of the act of July 23, 1955, *supra*, requires a miner to file if he desires to retain all of his rights to the surface of his claim must be under oath. Solicitor's opinion M-36419 (February 25, 1957). Also see *Alumina Development Corporation of Utah et al*, 67 I.D. 68, 72 (1960).

Accordingly, the decision appealed from is affirmed.

It should be noted that this decision does not determine the validity of the mining claims listed in the verified statement. It does not preclude the mining claim owners from attempting to develop the claims under the mining laws, subject to the limitations or restrictions specified in section 4 of the act of July 23, 1955, *supra*, which includes the right of the United States to manage and dispose of the vegetative surface resources on the lands embraced in the claims and to manage other surface resources thereon until such time as the claims may be patented.

Bertha Carlson, Administratrix of the Estate of Clyde E. Moser, is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840, 29 F.R. 4326, March 31, 1964 (formerly 43 CFR Part 221). See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for *each* mining claim included in the appeal. 2/ If the appeal covers the mining claims adversely affected by this decision the total filing fee is $35. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence wherein the decision appealed from is in error.

John B. Piccolo
Acting Chief,
Division of Appeals

Enclosure
DISTRIBUTION:
Mrs. Bertha Carlson (Certified Mail)
Hon. Thomas H. Kuchel, United States Senate
Hon. Harold T. (Bizz) Johnson, House of Representatives
Division of Minerals (3)
Gower Federal Service
Appeals List No. 1
WHW

2/ The notice of appeal should identify by name not more than seven mining claims.

appeal to Sec.
affirmed & Remanded
A-30321

DOCKET FILES

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1964 MAY 18 AM 10 00

In reply refer to:
6.05c
Sacramento 073688-LL
May 12, 1964

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

DECISION

John H. Lawrence
Amy Bowles Lawrence
George M. Bowles [1]

Mannie Louise Gold Placer
Mining Claim

Decision Affirmed

John H. Lawrence has appealed from a decision of the land office at Sacramento, California, dated October 18, 1963, which declared the Mannie Louise Gold Placer Mining Claim null and void *ab initio* and held ineffective his verified statement filed pursuant to the act of July 23, 1955 (30 U.S.C. sec. 613 *et seq.* (1958)) because the claim was located on lands contained within a power site withdrawal at a time when the lands were not open to mineral location.

The verified statement showed that the mining claim covered lands in the NE$\frac{1}{4}$ sec. 19, T. 1 S., R. 8 E., Humboldt Meridian, California, and that the claim was located on September 9, 1944. The record shows that these lands were withdrawn from mineral location when they were included in Power Site Classification No. 115, dated September 21, 1925, and at the time the Mannie Louise claim was located the lands had not been restored to location pursuant to section 24 of the Federal Power Act of June 10, 1920 (16 U.S.C. sec. 818 (1958)).

The appellant asserts that one Joseph Rys located the Oak Flat Gold Placer Mining Claim on June 28, 1920, and that subsequent to the power site withdrawal of September 21, 1925, an effective location of the Oak Flat Gold placer claim under the name of Mannie Louise, the boundaries of which are identical, was made by Mannie Lee Sims, the immediate predecessor of John H. Lawrence, the present owner and appellant. It is contended that the appellant cannot be dispossessed of possession of title to the real property as successor in interest to Joseph Rys.

Prior to the passage of the act of August 11, 1955 (30 U.S.C. sec. 623 (1958)), lands embraced in an existing power site withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power site purposes, but prior to the passage of the act, is null and void where the lands embraced in the claim had not been restored to entry under section 24 of the Federal Power Act, *supra*, at the time of location. *Day Mines, Inc.*, 65 I.D. 145 (1958); *Grant Green*, A-29771 (September 18, 1963). Consequently, the Mannie Louise Gold Placer Mining Claim was properly declared to be null and void *ab initio*.

---

[1] Mrs. Lawrence and Mr. Bowles were not named in the land office decision although John H. Lawrence indicated in the verified statement that they had an interest in the claim. Therefore, they are herewith made parties to this decision.

However, although the claim located in 1944 is void, whether considered to be an original or amended location of an earlier claim, the appellant would not lose his rights in any earlier claim to which he may have succeeded in interest. But, for the appellant to be considered as having possessory rights against the United States with respect to such earlier claim, he will have to present evidence to establish that it was in fact located prior to the date of the withdrawal of the land from mining location, that he is the true successor in interest to the original claimant having an unbroken chain of title from him, and that the lands claimed by him are the same as those originally located. If he can establish those facts, then another question will have to be considered such as whether the original claim was perfected by a valid discovery before the withdrawal. J. Everett Nelson, A-29174 (February 4, 1963).

In any event, the verified statement is ineffective as to the mining location attempted in 1944. It is to be noted that as a consequence of no verified statement having been timely filed identifying the alleged earlier mining location, even if it can be shown that the earlier claim is valid, and the appellant is its successor in interest, the United States has obtained the right to manage and dispose of the vegetative resources and to manage other surface resources thereof, under the provisions of the act of July 23, 1955, supra, until such time as the claim may be patented.

Accordingly, the decision appealed from is affirmed.

The named parties are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Parts 1840, 29 F.R. 4326, March 31, 1964 (formerly 43 CFR Part 221). See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

John B. Piccolo
Acting Chief,
Division of Appeals

Enclosure

DISTRIBUTION
Regan and Kennedy, Attorneys for Appellant (Certified Mail)
John H. and Amy Bowles Lawrence (Certified Mail)
Mr. George M. Bowles (Certified Mail)
Regional Forester, Forest Service, U.S. Dept. of Agriculture
Division of Minerals (3)
Gower Federal ServiceA
Appeals List No. 1
WHW

appeal to Sec
affirmed A-30336
7-30-65

DOCKET FILES

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1964 JUN 24 AM 10 00

Administrative Procedure Act: Generally--Findings of Fact (Mining Claims)

The findings of fact of a hearing examiner who has conducted a hearing in accordance with the provisions of the Administrative Procedure Act will be controlling unless shown to be clearly erroneous.

Administrative Procedure Act: Generally--Bias (Mining Claim)

Charges of prejudicial bias on the part of a hearing examiner are without merit when there is nothing in the record to support them and bias cannot be inferred from the fact that a hearing examiner credits evidence favorable to a contestant and discredits evidence favorable to a contestee.

Mining Claims: Discovery 3413

Mining claims are properly declared null and void where there is no evidence of minerals on the claims of such a character that a person of ordinary prudence would be justified in spending further time and money in an effort to develop a valuable mine.

United States v. August Herman, Sacramento Contest No. 5905. (June 11, 1964)

MA 065525

In reply refer to:
704
Sacramento Contest No. 5905

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

June 11, 1964

Certified Mail
Return Receipt Requested

DECISION

United States,
Contestant,

v.

August Herman,
Contestee.

Involving the Betty Jean, Betty Jean Number Two, A. Lily #2, and Red Devil placer mining claims; situated in the NE$\frac{1}{4}$ Sec. 32, T. 33 N., R. 6 W., M.D.M., Shasta County, California.

Decision Affirmed

Mr. August Herman has appealed from a hearing examiner's decision, dated October 24, 1963, which declared null and void the above identified placer mining claims and rejected the mineral patent application Sacramento 065525, filed by Mr. Herman. The Examiner held that the evidence fails to show the existence of valid discoveries of valuable mineral deposits on any of the contested claims.

In his appeal, Mr. Herman contends that the Government did not establish a *prima facie* case in support of its charges that no discoveries exist on the contested claims. He asserts that the Government's mineral examiner did not make a proper evaluation of the claims, primarily because he did not take representative samples of the mineral material found on them. He contends that the Examiner's findings of fact are not consistent with the evidence of record, and that he has shown, by the testimony of four independent, experienced examiners, that the claims are valid. Mr. Herman also asserts that the bias and prejudice of the Examiner prevented him from presenting his case in the most effective manner.

The evidence of record is thoroughly summarized in the Examiner's decision and need not be restated here. We have, however, carefully reviewed the entire record. We find that the evidence in the record does not support the contestee's assertions.

The contestee's appeal is primarily an attack on the Examiner's findings of fact. 1/ These findings will, however, be controlling unless shown to be clearly erroneous. The resolving of conflicting testimony is a function of a hearing examiner as it deals directly with the weight to be given evidence and the credibility of witnesses, matters which a hearing examiner is in a better position to decide than the Director when he is acting on an appeal.

1/ Whether or not there has been a representative and accurate sampling of a mining claim is a question of fact. See *Pittsburgh Concentrating & Milling Co. v. Glick*, 42 Pac. 188 (1895).

Thus, if a hearing examiner's findings are supported by substantial probative evidence they will not be disturbed. Only if it is shown that his findings of fact are against the great weight of evidence will they be reversed.

In the instant case the record shows that the Examiner's findings of fact are based on substantial probative evidence. The record shows that the Government's mineral examiner, who testified as an expert witness for the contestant, properly examined the contested claims. His sampling techniques and procedures were consistent with the accepted standard methods in the mining profession and were calculated to be representative of the mineral material found in those places identified by the contestee as his discovery points. Our review of the record confirms the Examiner's conclusion that the majority of the samples taken by the contestee and his employees are not representative of the body of material the contestee proposes to mine. It must be remembered that the contestee would have to either remove or process all of the overburden and not merely the material on and immediately above bedrock, and that the cost of handling the overburden must be considered in determining the overall value of the claims for mining purposes. Adams v. United States, 318 F. 2d 861 (9th Cir. 1963).

The contestee asserts that the Examiner demonstrated a prejudice against him in his orders regarding a joint sampling of the contested claims. The record shows that a hearing was held on October 17, 1962, at the conclusion of which a joint sampling program was ordered by the Examiner in an attempt to resolve the apparent disparity between the samples taken by the Government's mineral examiner and those taken by the contestee (Tr. 113 et seq.). Although the Examiner stated in some detail the procedure to be followed in taking the joint samples (Tr. 117) there arose a subsequent disagreement between the parties as to the manner in which the sampling program was to be carried out. As a result of this disagreement a prehearing conference was held under the direction of the Examiner on November 14, 1962, which was attended by representatives of both parties. This prehearing conference resulted in an amended joint sampling order and there was substantial agreement between the Government's mineral examiner and the mining engineer employed by the contestee as to how this amended order should be implemented. The contestee was not, however, willing to carry out the sampling program outlined by the two mining engineers (Tr. 254 - 263). In his appeal Mr. Herman states that he was willing to abide by the first joint sampling order, but that the amended order was conceived by the Government's mineral examiner solely for the purpose of running the cost of joint sampling so high as to be economically unfeasible.

We find no merit in this contention. An analysis of the joint sampling orders shows they were drawn in an effort to satisfy both parties and to obtain representative samples of the mineral material the contestee proposes to mine. The record shows that the contestee, or his representative, participated in the formulation of the orders and that his mining engineer was in substantial agreement with the Government's mineral examiner regarding the best way to implement the joint sampling order.

Finally, the contestee asserts that the Examiner, in his rulings and statements made during the hearing, substantially prevented him from having a fair hearing. A review of the hearing transcript fails to substantiate this assertion.

The transcript shows that the Examiner conducted the hearing in accordance with the provisions of the Administrative Procedure Act (5 U.S.C., 1958 ed., 1001 et seq.); that he was impartial in his attitude toward and treatment of counsel for both sides; and that he permitted both sides to submit all the relevant and material evidence they desired. It is true that the Examiner, on occassion, prevented the introduction of repetitious, irrelevant or immaterial testimony. There is, however, nothing in the record to show that he was prejudiced against the contestee in this regard. Nor can bias be inferred from the fact that he credited evidence favorable to the contestant and discredited evidence favorable to the contestee. See N.L.R.B. v. Howell Chevrolet Co., 204 F. 2d 79, 86 (1953).

It is evident that the contestee is willing to proceed in an effort to develop the claims. Such a willingness is not, however, a substitute for evidence of minerals of a character which would induce a man of ordinary prudence to spend further time and money in an effort to develop a valuable mine. United States v. William M. Barnett et al., A-29157 (May 13, 1963). There is no such evidence of minerals in the instant case, and in its absence the contested claims were properly declared null and void. Castle v. Womble, 19 L.D. 455 (1894).

Accordingly, the decision of the Examiner is affirmed.

August Herman is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See the enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The amount of the filing fee will be $5 for each claim for which favorable action is sought; a total of $20 if the appeal covers all of the claims involved in this decision. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellant will have the burden of proving, by presenting substantial affirmative evidence, that this decision is erroneous.

In the event an appeal is filed the adverse party to be served will be:

Regional Solicitor
U. S. Department of the Interior
P. O. Box 21-4215
Sacramento, California

James F. Doyle
Chief, Office of Appeals and Hearings

Enclosures (2)

DISTRIBUTION

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Gower Federal Service
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Administrative Assistant, Hearings
Appeals List No. 1
LLM

DOCKET FILES

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1964 JUN 29 AM 10 00

Administrative Procedure Act: (Notice)

Contests and Protests: (Notice)

Hearings Procedures: Government Contests-(Notice) 1852.2

> Where there has been no notice of contest against a mining claim and in the absence of a waiver of such notice by the contestees, the requirements of due process, which implies notice and hearing, have not been met and, as a consequence, a Hearing Examiner is without jurisdiction to determine the validity of such mining claim.

United States v. Wendell J. Phillips et al, Contest No. 10-343 (Sacramento) (June 12, 1964)

In reply refer to:
704
Contest No. 10-343
(Sacramento)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

June 12, 1964

DECISION

United States of America,
Contestant

v.

Wendell J. Phillips; Estate of
Wendell W. Phillips, Deceased;
Lawrence C. Phillips; Russell N.
Phillips; Floyd E. Phillips;
Marjorie M. Briggs, Individually
and as Administratrix of the
Estate of Llewellyn P. Phillips,
Deceased; Dorothy E. Wall; O. B.
Hart,
Contestees

Short Bend placer mining claim
situated in sec. 17, T. 33 N.,
R. 8 W., M.D.M., Trinity County,
California. 1/

Decision Reversed in Part

Wendell J. Phillips and Dorothy E. Wall have appealed from that portion of a Hearing Examiner's decision, dated October 30, 1963, declaring the Short Bend placer mining claim null and void for lack of discovery of a valuable mineral deposit.

The appellants contend on appeal that the contest complaint named the Lynch Bar mining claim described as the W½SW¼NW¼ sec. 17, T. 33 N., R. 8 W., M.D.M., California, embracing 20 acres, and that the Hearing Examiner's decision is incorrect in stating that the Short Bend placer mining claim, located on the W½SW¼NW¼ and the NE¼SW¼NW¼ sec. 17, T. 33 N., R. 8 W., M.D.M., encompassing 30 acres, is a relocation of the Lynch Bar since the Short Bend contains 10 additional acres. It is further contended that the contestant in no way established a prima facie case that no discovery existed within the limits of the Short Bend claim.

The record shows that the contest complaint in this case, dated January 17, 1958, was directed against the Lynch Bar and New Confidence placer mining claims located on April 10, 1910 and April 24, 1938, respectively. The Short Bend placer mining claim was not named in any contest complaint served on the contestees involved in the hearing held as to the Lynch Bar and two other mining claims. While the Hearing Examiner during the hearing stated that he would take official notice of the recordation of the Short Bend placer claim, the record made at the hearing is devoid of

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1/ This appeal does not involve the Lynch Bar, New Confidence and Excelsior placer mining claims named in the Hearing Examiner's decision, which constitutes final administrative action as to those claims.

any oral or written stipulation entered into by the contestees waiving the requirement of service of notice of contest setting forth charges against the Short Bend placer claim.

In Cameron v. United States, 252 U.S. 450 (1920), the Supreme Court recognized that the mineral land laws do not themselves confer upon the Secretary of the Interior authority to declare mining claims invalid, but held nevertheless that the Secretary does possess such authority. The Court added:

> "Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing to determine whether the claim is valid and, if it is found invalid to declare it null and void." 252 U.S. 450, 459-460.

The requirement of due process which implies notice and a hearing must not be violated. Orchard v. Alexander, 157 U.S. 372, 383 (1895); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963).

In the instant case, owing to the lack of notice of contest against the Short Bend placer claim and in the absence of a waiver of such notice by the contestees, the requirement of due process had not been met. As a consequence, jurisdiction was not obtained and the hearing examiner was not clothed with authority to make a determination as to the validity or invalidity of the Short Bend placer mining claim.

Accordingly, that portion of the decision appealed from which declares, specifically or by inference, the Short Bend placer mining claim null and void is hereby reversed. 2/

James F. Doyle

Chief, Office of Appeals
and Hearings

DISTRIBUTION:
Mrs. Dorothy E. Wall
Wendell J. Phillips
Regional Solicitor, U. S. Department of the Interior
Office of Hearing Examiners (Sacramento, California)
Division of Lands & Minerals Standards & Technology (4)
Division of Lands & Minerals Program Management (2)
Administrative Assistant, Hearings
Gower Federal Service

Appeals List No. 1
WHW

2/ This decision does not prejudice the right of the Government to initiate proper adverse proceedings against the Short Bend Placer claim in the future, if it so desires.

Mining Claims: Withdrawn Land 3400.1; 3400.4

DOCKET FILES
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1964 JUN 26 PM

Public Land which has been withdrawn for reclamation purposes is not subject to entry under the mining laws of the United States and an attempted mining location on such land is illegal and void from its purported inception.

Mining Claims: Location 3414

Section 2332 of the Revised Statutes which provides that where any persons have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory in which they are situated, evidence of such possession and working of the claims for such a period shall be sufficient to establish a right to a patent thereto under the applicable mining laws of the United States does not dispense with the necessity of a valid discovery and does not help a mining claimant who cannot show that he has held and worked his claim for the statutory period.

Mining Claims: Lands Subject to: 3400.1

Land which has been granted to a State under the provisions of section 1 of the act of August 27, 1958, as a material site right-of-way is not subject to mining locations.

Rights-of-Way: For Roads, Railroads, Station Grounds, Wagon Roads and Tramways 2234.2

Land which has been granted to a State under the provisions of section 1 of the act of August 27, 1958, as a material site right-of-way is not subject to mining locations.

L. H. Hogsett et al., Riverside 04223 (June 17, 1964)

In reply refer to:
704
Riverside 04223

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

June 17, 1964

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

L. H. Hogsett et al. 1/ : Involving the J.M.H. Placer
: Mining Claim; situated in the
: W$\frac{1}{2}$NW$\frac{1}{4}$, NE$\frac{1}{4}$NW$\frac{1}{4}$, NW$\frac{1}{4}$SW$\frac{1}{4}$ sec. 18,
: T. 9 S., R. 13 E., S.B.M.,
: Imperial County, California
:
Decision Affirmed

The above-named parties have appealed from a decision of the Manager, Riverside Land Office, dated December 5, 1963, declaring null and void the above-identified placer mining claim. The Manager held that the claim was null and void ab initio because the land upon which it is situated was withdrawn from mineral entry and reserved for reclamation purposes at the time the claim was located.

An examination of the record confirms the fact that the land upon which the J.M.H. placer mining claim is situated was withdrawn when the mining claimants attempted to locate that claim, on November 3, 1952, and that the land was not open to location under the mining laws of the United States until December 29, 1956.

The mining claimants do not contend in their appeal that the land was subject to mineral entry at the time they attempted to locate their claim, but they assert that the expenditure of labor and money in doing the necessary assessment work since 1952 should be recognized as giving them a vested interest in the claim as of September /December/ 29, 1956.

Public land which has been withdrawn for reclamation purposes is not subject to entry under the mining laws of the United States and an attempted mining location on such land is illegal and void from its purported inception. Ted W. Fay et al., A-29781 (January 30, 1964). Thus, the Manager properly declared the J.M.H. placer mining claim to be null and void.

It is true that Section 2332 of the Revised Statutes (30 U.S.C., 1958 ed., sec. 38) provides that where any persons have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory in which

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1/ The mining claimants are: L.H. Hogsett, Rose C. Hogsett, Norma Hogsett, H. Earl Marteeny, Marjorie E. Marteeny, Lloyd W. Jones, Mildred E. Jones and W. H. Young.

they are situated, evidence of such possession and working of the claims for such a period shall be sufficient to establish a right to a patent thereto under the applicable mining laws of the United States. The effect of this section is simply to declare that possession for the statutory period is the equivalent of a valid location. It does not dispense with the necessity of a valid discovery. Cole v. Ralph, 252 U.S. 286 (1920). Moreover, a mining claimant cannot claim the benefit of this law where he cannot show that he had held and worked his claim for the statutory period. Anthony v. Jillson, 23 P. 419 (1890).

The record shows that the appellants cannot meet the terms of this law. The period of time prescribed by the California statute of limitations is five years. 2/ Therefore, the mining claimants would have had to have held the mining claim from December 29, 1956, to December 28, 1961, in order to meet the time prescribed by the State's statute of limitations. The record shows, however, that on July 9, 1959, the State of California was granted a material site right-of-way under the provisions of the act of November 9, 1921 (42 Stat. 216; 23 U.S.C. sec. 18), now section 1 of the act of August 27, 1958 (72 Stat. 916; 23 U.S.C., 1958 ed., sec. 317(a)(b) and (c)). This grant served to withdraw the land from mineral entry. Sam D. Rawson, 61 I.D. 255 (1953). Thus, the continuity of the claimants' possession under their invalid location was broken by the appropriation and transfer of the land to the State within two and one-half years after the land became subject to mining locations. This break in continuity deprives them of whatever rights they may have acquired had they held the claim the required period of time. See Belk v. Meagher, 104 U.S. 279 (1881).

It should also be noted that section 3 of the act of July 23, 1955 (69 Stat. 368; 30 U.S.C., 1958 ed., sec. 601), provides that:

> "A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws:"

For this reason, if the J.M.H. placer mining claim is what the record indicates, a location for common sand and gravel, the appellants could not possibly have acquired a vested interest in the claim when the land was opened on December 29, 1956, to mineral locations under the mining laws of the United States regardless of the length of time they held it thereafter.

Accordingly, the decision of the Manager is affirmed.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See the enclosed Form WO 1844-1 and Circular 2137. If and appeal is taken

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2/ California C.C.P.A. sec. 325.

it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving by presenting positive and substantial evidence wherein this decision is erroneous.

John B. Piccolo
Chief, Branch of Mining
and Grazing Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Mr. D. M. Campbell, Attorney for the appellants (Certified Mail)
Each Appellant
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Administrative Assistant, Hearings
Appeals List No. 1
Gower Federal Service
LLM

DOCKET FILES

In case file

Multiple Mineral Development: Public Law 359 (Mining in Powersite Withdrawals) 3530

A finding that no placer mining operations shall be conducted upon a placer claim located on land subject to public Law 359 is proper where the evidence presented at a public hearing shows that such operations will substantially interfere with other uses of the land.

Hearings Procedures: Generally 1850

Where a hearing has been held in a contest the record made shall be the sole basis for a decision except to the extent that official notice may be taken of certain facts, and information submitted on appeal which is not a part of the evidence submitted at a hearing cannot be used to decide the merits of the decision appealed from but may be considered only to determine whether there is a sufficient basis for ordering a new hearing.

United States v. Doris L. Jordan et al., Sacramento 075313 (July 1, 1964)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1964 JUL 16 AM 10 00

In reply refer to:
704
Sacramento 075313

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D. C. 20240

July 1, 1964

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States, : Involving the Mona Lite placer
Protestant, : mining claim; situated in the
: W½NW¼ Sec. 27, T. 37 N., R. 3 E.,
v. : M.D.M., Shasta County, California,
: within the Shasta National Forest.
Doris L. Jordan et al., 1/ :
Protestees. :

Decision Affirmed

The above-named parties have appealed from a hearing examiner's decision, dated December 6, 1963, holding that placer mining operations on the above-identified claim would substantially interfere with other uses of the land. The Examiner held, for this reason, that no placer mining operations shall be conducted upon the Mona Lite mining claim.

The record shows that the Mona Lite placer mining claim was located January 25, 1961, on land subject to the provisions of the act of August 11, 1955 (Public Law 359) (69 Stat. 681; 30 U.S.C.A. 621), as amended. In a letter dated May 7, 1963, the mining claimants were advised that the Forest Service, U. S. Department of Agriculture, had informed the Bureau that its investigation of the claim and the surrounding area disclosed that placer mining would substantially interfere with other uses of the land, and that it was the intention of the Secretary of the Interior to hold a public hearing pursuant to section 2(b) of Public Law 359. The mining claimants were advised that they would be given further notice when the hearing date was set and that, in the interim, they should not conduct mining operations on their claim. The record shows that the claimants were subsequently advised, by a Notice dated August 19, 1963, that a hearing would be held at 9:00 a.m. on October 1, 1963. However, neither the mining claimants nor their attorney appeared at the hearing.

The testimony given during the October 1, 1963, hearing has been summarized by the Examiner in his decision and need not be repeated here. It is the appellants' contention that this testimony is inaccurate and incorrect, and they have, in their appeal, submitted information which, they assert, shows the true state of conditions existing on and near their claim.

1/ The mining claimants, (protestees) are: Doris L. Jordan, Jim Jordan, Lester Jordan and Richard Jordan.

The regulation 43 CFR 3532.2, formerly 43 CFR, 1964 Rev., 185.177(a), states that the conduct of hearings held pursuant to section 2(b) of Public Law 359, *supra*, "shall follow provisions of appeals and contests of the Department of the Interior (Part 1850 of this title) in effect at the time the hearing is held." One such provision in effect at the time the hearing in the instant case was held, 43 CFR 1850.0-8(a)(3), formerly 43 CFR, 1964 Rev. 221.99(c), states that "Where a hearing has been held in a contest the record made shall be the sole basis for decision except to the extent that official notice may be taken of a fact as provided in paragraph (b) of this section." Accordingly, the information submitted by the appellants, not being a part of the evidence submitted at the hearing, cannot be used to decide the merits of the instant case on appeal. *United States* v. *Kenneth O. Watkins and Harold E. L. Barton*, A-29862 (April 24, 1964).

We have carefully reviewed the evidence presented at the October 1 hearing. We find that it clearly supports the Examiner's conclusion that no placer mining operations should be conducted upon the Mona Lite mining claim. We have also reviewed the appellants' statement of reasons for appeal to determine whether there is a sufficient basis for ordering a new hearing. *United States* v. *Kenneth O. Watkins and Harold E. L. Barton*, *supra*. It is our opinion that it does not.

Accordingly, the Examiner's decision is affirmed. When this decision becomes final an order prohibiting placer mining operations on the Mona Lite placer mining operations on the Mona Lite placer mining claim will be issued as required by section 2(b) of public law 359. 43 CFR 3532.2(c), formerly 43 CFR, 1964 Rev., 185.177(c).

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See the enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellants will have the burden of showing wherein this decision is erroneous.

In the event an appeal is filed the adverse party to be served will be:

Regional Attorney
U. S. Department of Agriculture
25 Taylor Street - Room 624
San Fransisco, California

James F. Doyle
Chief, Office of Appeals and Hearings

Enclosures

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Regional Forester, Forest Service, United States Department of Agriculture
Office of General Counsel, Forestry and Lands Division,
    United States Department of Agriculture
Forest Service, Recreation and Land Uses, United States Department
    of Agriculture
Gower Federal Service
Administrative Assistant, Hearings
Division of Lands & Minerals Standards & Technology (4)
Division of Lands & Minerals Program Management (2)
Division of Resource Standards & Technology
Division of Resource Program Management
Appeals List No. 1
LLM

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
DOCKET FILES
1964 JUN 29 PM 3 02

Multiple Mineral Development: Act of July 23, 1955--Verified Statement 3512.9

The waiver and relinquishment of surface rights contemplated by section 6 of the act of July 23, 1955, is of no effect if it is neither acknowledged nor recorded as required by law.

Multiple Mineral Development: Act of July 23, 1955--Verified Statement 3512.9

While there is nothing in the law or regulations providing for the withdrawal of a verified statement, there is no reason why a mining claimant may not withdraw such a statement if he chooses; however, the mining claimant may rescind the withdrawal if it does not, by its terms, take effect until accepted by the appropriate land office, and the mining claimant rescinds it prior to its acceptance.

Owensville Mining Association, Sacramento 065501-C (June 19, 1964)

In reply refer to:
704
Sacramento 065501-C

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

June 19, 1964

DECISION

Owensville Mining Association : Verified Statement

Decision Vacated

Mr. Owen O. Roberts, President of the Owensville Mining Association, has appealed to the Director from a decision issued by the Sacramento Land Office, dated December 20, 1963, holding that the Association did not have the right to rescind its withdrawal of a verified statement it had filed on June 2, 1961.[1]

The record shows that in a letter dated September 4, 1963, eight days after he had signed the withdrawal form, the appellant stated that he wished to have the withdrawal disregarded and set aside until he received satisfactory answers to certain questions regarding the use and management of the claims identified in the verified statement, and that in a letter dated October 29, 1963, he stated that it was the intention of the Association to rescind the withdrawal of its verified statement and proceed to a hearing.

In its decision of December 20, 1963, the Land Office held that the withdrawal of the verified statement took effect without further action by the Land Office so that all rights claimed under the statement were immediately extinguished, and that the filing of the withdrawal was voluntary and is binding on Mr. Owens and the Owensville Mining Association.

We have carefully reviewed the record and have concluded that the appellant should have been permitted to rescind its withdrawal of its verified statement.

Section 6 of the act of July 23, 1955 (69 Stat. 367; 30 U.S.C., 1958 ed., sec. 601) provides as follows:

> "The owner or owners of any unpatented mining claim heretofore located may waive and relinquish all rights thereunder which are contrary to or in conflict with the limitations or restrictions specified in section 4 of this act as to hereafter located

---

[1] The verified statement included the Owensville Nos. 1 through 8 and Owensville No. 10 mining claims. The appeal includes only the Owensville Nos. 3, 4, 6 and 10. All of the claims are located in T. 25 N., R. 16 E., M.D.M., Lassen County, California.

> unpatented mining claims. The execution and acknowledgment of such a waiver and relinquishment by such owner or owners and the recordation thereof in the office where the notice or certificate of location of such mining claim is of record shall render such mining claim thereafter and prior to issuance of patent subject to the limitations and restrictions in section 4 of this act . . . ." Emphasis added.

Thus, assuming arguendo that the withdrawal of the verified statement was intended to be the "waiver and relinquishment" contemplated by the above-quoted section 6, it could not take effect unless it was executed and acknowledged and until it was recorded in the office where the notice or certificate of location of the affected mining claims are of record. The withdrawal submitted in the instant case was neither acknowledged nor recorded. Hence, it is without effect.

While we see no reason why a mining claimant may not withdraw his verified statement if he chooses, there is nothing in the law or regulations regarding such a withdrawal. Thus, there are no provisions or guidelines as to what form a withdrawal should take, how it should be executed, or when it will take effect.

In the instant case, the withdrawal of the verified statement is a form letter which has been completed and signed by Owen O. Roberts. Among other things, this form letter states "It is my understanding if the above mentioned amendments and withdrawals are accepted by the Land Office" that a hearing pursuant to section 5(c) of the act of July 23, 1955, will not be held, and that the lands included within the affected claims will, prior to patent, be subject to the use and management of the United States. This language, which clearly contemplates an acceptance of the withdrawal by the appropriate land office, is inconsistent with the conclusion reached in the decision appealed from that the withdrawal of the verified statement took effect immediately without further action by the Land Office. In view of this language, it is our opinion, assuming that the withdrawal was properly executed and all else was regular, that it would not take effect until the Land Office notified the mining claimant that it had been accepted.

Accordingly, the decision appealed from is vacated and the case record remanded to the Sacramento Land Office, through the Bureau's State Director for California, for further appropriate action.

John B.

Acting Chief, Office of Appeals and Hearings

DISTRIBUTION

Owensville Mining Association
Regional Forester, Forest Service
  U. S. Department of Agriculture
Gower Federal Service
Division of Lands and Minerals
  Standards and Technology (4)
Division of Lands and Minerals
  Program Management (2)
Division of Resource Standards
  and Technology (2)
Division of Resource Program Management
Appeals List No. 1
LLM

appeal to Sec
Set aside - Remanded A-30407
4-30-68
(Pub.)

DOCKET FILES

Mining Claims: (Common Varieties of Minerals) 3511

A deposit of stone having an attractive color and cleavability, used as a veneer for walls and in the construction of fireplaces, hearth and patios, and which exists in greater proportion in the deposit than in other deposits in the area, is not an uncommon variety of building stone which is locatable under the mining laws because it has a special and distinct value where it is not shown to have any uses over and above those of deposits of ordinary building stone in the locality.

United States v. U.S. Minerals Development Corporation, Contest No. 01511 (Riverside) (October 29, 1964)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1964 NOV 16 AM 10 00

In reply refer to:
7045
Riverside Contest No. 01511

October 29, 1964

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D. C. 20240

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States,
Contestant,

v.

U. S. Minerals Development
Corporation,
Contestee.

Involving the Desert Sunset
Association Placer Mining
Claim situated in the $NW\frac{1}{4}NE\frac{1}{4}$
sec. 21, T. 3 S., R. 21 E.,
S.B.M., Riverside County,
California

Decision Reversed

The United States of America has appealed from a hearing examiner's decision, dated July 22, 1963, dismissing a contest complaint which charged, in essence, that the material found within the limits of the above-identified placer mining claim is not a valuable mineral deposit subject to location under the mining laws of the United States since the enactment of Public Law 167 (the act of July 23, 1955 (69 Stat. 367 (1955), as amended; 30 U.S.C. 611 (1958)). 1/

1/ Section 3 of the Act reads as follows:

> "A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. 'Common varieties' as used in this act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called 'block pumice' which occurs in nature in pieces having one dimension of two inches or more."

The Examiner's decision was based on his interpretation of the regulation 43 CFR 3511.1(b), (formerly 43 CFR 185.121(b), as amended (27 F.R. 9137, September 14, 1962). 2/ The Examiner stated:

> "Under the earlier definition of common variety a material had to have an 'economic value for use over and above the normal uses of the general run of such deposits' in order to be locatable. Thus, the element of 'use' was stressed and unless a building stone had value for a use superior to other building stones it was considered to be a common variety.' The amended regulation provides that 'if a particular deposit has distinct and special properties making it commercially valuable for use in an industry it shall not be deemed a common variety. Here commercial value rather than comparative use is the basis of the determination."

2/ Before its amendment in 1962, this regulation defined common varieties as follows:

> "(b) 'Common varieties' as defined by decision of the Department and of the courts include deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Section 3 2/ of the law has no application where the mineral for which a location is made is carried in or borne by one of such common varieties.
>
> 2/ Thus, while marble would not be a common variety of stone, ordinary building stone or sand and gravel or pumice or limestone used in building would be."

This regulation was amended to read as follows:

> "(b) 'Common varieties' includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be 'common varieties' if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transporation,

(Footnote 2 continued on page 3)

Consistent with his definition, the Examiner held that the "rosado stone" found on the contested claim is not a common variety of mineral because it has an attractive color and sufficient schistosity to be commercially valuable as a building stone and is marketable at a profit; and it has been and is being sold at a price substantially higher than that received for ordinary desert stone found in the area.

There is no substantial dispute concerning any material facts in the instant case. Both parties have stipulated that the stone is marketable and that a market exists at the present time. They have also stipulated that an adequate quantity of the stone can be found on the claim. The sole issue is whether or not the rosado stone is a "common variety" of mineral and removed from the category of valuable minerals subject to location under the mining laws of the United States by section 3 of the act of July 23, 1955, supra.

The contestant asserts in its appeal that the Department has held that color, cleavability, demand, price and quantity, the characteristics relied upon by the Examiner to take the rosado stone out of the category of common varieties, do not give a building stone a special, distinct value; citing the cases of United States v. J. R. Henderson, 68 I.D. 26 (1961); United States v. D. C. Ligier, A-29011 (October 8, 1962); United States v. Kelly Shannon et al., 70 I.D. 136 (1963); and United States v. Frank Melluzzo, 70 I.D. 184 (1963). It contends the decision United States v. Kenneth McClarty, Washington Contest No. 4435 (September 24, 1962), issued by the Director, Bureau of Land Management, and relied upon by the Examiner and the contestee, is not consistent with the previously cited departmental decisions and should not be followed. The contestant asserts that it is the intent of Public Law 167, supra, to exclude minerals which are essentially building materials from location under the mining laws and that rosado stone is obviously within this category.

(Continuation of footnote 2)
requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not 'common varieties.' This subsection does not relieve a claimant from any requirements of the mining laws."

In its answer to the contestant's appeal, the contestee asserts that the Henderson, Ligier and Shannon decisions, supra, were properly distinguished by the Examiner on the ground that the materials involved in those cases were so common and widespread that the only value in the product sold was the service of quarrying, processing and delivering, and that the Melluzzo decision, supra, is also distinguishable for the same reason. The contestee asserts that the rosado stone found on its claim possesses distinctive characteristics which set it apart, and that there are no comparable deposits of the same variety of quartz in the San Bernardino-Los Angeles area. Finally, the contestee asserts that no stone should be classified as a common variety if it can be marketed for a higher than normal profit whether the special value results from the esthetic appearance of the stone or its intrinsic composition.

The Examiner's interpretation of the 1962 amendment of the regulation 43 CFR 3511.1(b), supra, is not correct. In the Melluzzo decision, supra, the Department noted, on page 185, that the amendment made no changes insofar as the issues in that case were concerned. That case involved the same issue under consideration in the instant case; that is, whether or not a particular variety of stone is a common variety within the meaning of section 3 of the act of July 23, 1955, supra.

Moreover, the Examiner's interpretation of the regulation is not consistent with the Department's rulings in the Ligier, Shannon and Melluzzo decisions, supra, all of which were issued after the amendment of the regulation. In the Shannon decision the Department specifically held that a crystalline quartz which was attractive in appearance and suitable for use as a decorative facing on buildings and fireplaces and for landscaping purposes was, nevertheless, a common variety. In a more recent decision, the Department observed that in a number of cases which have been decided since July 23, 1955, the contention that the special adaptability of minerals for purposes which are recognized as ordinary uses of common varieties of such minerals takes the particular minerals out of the category of common varieties has been considered and rejected. United States v. J. R. Cardwell et al., A-29819 (March 11, 1964).

Further, the Department in United States v. Kenneth McClarty, A-29821 (August 27, 1964), reversed the Bureau decision, supra, and held a building stone is not an uncommon variety of stone where that stone is used for the same purposes for which other deposits readily available are also suitable.

The contestee has, in the instant case, stipulated that the rosado stone found on its claim can be used "for general purposes in the building construction field" and for "No other purpose". (Tr. 19). The record shows that it has been used only as a veneer for walls and in the construction of fireplaces, hearths and patios. (Tr. 90-92). Thus, it is clear that the rosado stone is "used only for the same purposes as other deposits which are widely and readily available." United States v. J. R. Henderson, supra. It is therefore, a common variety of stone within the meaning of section 3 of the act of July 23, 1955, supra, and not subject to location under the mining laws of the United States.

It is true, as the contestee asserts, that the act of August 4, 1892 (27 Stat. 348 (1892); 30 U.S.C. 161 (1958)) provides for the entry of building stone lands under the provisions of the placer mining laws. This Act must, however, be considered in the light of the act of July 23, 1955, supra, which specifically provides that common varieties of stone are no longer subject to location. See United States v. Alfred Coleman, A-28557 (March 27, 1962).

Accordingly, the Examiner's decision is reversed and the Desert Sunset Association Placer Mining Claim is declared null and void.

The U. S. Minerals Development Corporation is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840 (formerly 43 CFR Part 221). See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington D. C. 20240. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

In the event an appeal is taken, the adverse party to be served will be:

Regional Solicitor
U. S. Department of the Interior
1020 Rowan Building
458 South Spring Street
Los Angeles, California 90013

James F. Doyle
Chief, Office of Appeals
and Hearings

Enclosure

Dist. on page 6

DISTRIBUTION:
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Div. of L&M, S&E (4); Div. of L&M, PM (2)
Appeals List No. 1 ; Hearing Examiner Graydon E. Holt (Sacramento)
LLM

United States of America
Contest No. 0170969-C-24 v.
(Riverside) Grace Martin Hutchins *et al.*

Approved December 4, 1964

DOCKET FILES

Contests and Protests

Where the charges, if proven, in a contest complaint against a millsite are such as would require that a millsite be declared invalid, and no answer to the contest complaint is filed, the charges are deemed admitted and the land office manager properly determined the millsite null and void.

Mining Claims: Mill Sites

Even though the Department's position is that a certain purported millsite is, in fact, not a millsite location but merely an application for a water right, where a contest is initiated against a purported millsite with a different name embracing the same land, it is proper to name the first millsite also in the contest complaint and to make and serve as contestees all persons known to assert a millsite interest in the land in issue.

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1964 DEC 11 AM 10 00

In reply refer to:
704
Contest No. Los
Angeles 017069-C-24
(Riverside)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

November 4, 1964

DECISION

United States of America, :
Contestant :
:
Grace Martin Hutchins, Charles W. :
Gleason, Margaret G. Jones, Mary K. :
Jones, Nellie T. Carthy, James G.
Gleason, and William C. Gleason,[1] :
Appellants-Contestees

Copper Gulch Millsite,[2] also
known as the Capital Springs
Millsite, located in sec. 5,
T. 30 S., R. 45 E., Mount Diablo
Mer., California.

Decision Affirmed

The above-named contestees have appealed from the decision of the Acting Manager of the Land Office at Riverside, California, dated April 14, 1964, declaring the above-identified millsite null and void for the stated reason that the contestees, by not filing an answer to the charges contained in the contest complaint served upon each of them, admitted the invalidity of the millsite.

Departmental regulations, in pertinent part, provide that if an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing. See

---

[1] The Acting Manager's decision also named the deceased James G. Dempsey as a contestee. As stated in the decision, the Superior Court of the State of California for the County of Orange, by Order dated January 25, 1963 (Case No. P. A. 999), distributed the assets of the Dempsey estate to Charles W. Gleason, Margaret G. Jones, Mary K. Jones, Nellie T. Carthy, James George Gleason, and William Charles Gleason. We note that the land office decision states that these distributees are the contestees.

[2] The appellants' statement of reasons alleges that the contestees "make no claim of the existence of a Copper Gulch Millsite as far as the records in the condemnation action are concerned." In effect, this statement may be a disclaimer as to the Copper Gulch millsite. However, the contest complaint and the Acting Manager's decision make no distinction between the purported location as the "Copper Gulch millsite" and the purported location as the "Capital Springs millsite"--the same persons and the same land are involved. For the purposes of this appeal, there is no merit to making a distinction since, no matter by what name the asserted millsite may be known, the purpose of this contest is to determine whether the appellants have a vested interest in the land involved.

43 CFR 1852.1-7. The appeal record shows that a contest complaint was served upon each of the contestees by certified mail on either June 8 or June 12, 1963. In the caption of the contest complaint the millsite is identified as the "Copper Gulch millsite," and at paragraph 3 of the contest complaint the millsite is identified as follows:

> This is an unrecorded millsite claim in Section 5, Township 30 South, Range 45 East, M.D.M., California, heretofore asserted by J. H. Dempsey and John Martin but for which compensation is sought by Grace Martin Hutchins as the "Capital Springs Millsite" in Civil Actions Nos. 3129-PH and 769-60-PH, pending in the United States District Court, Southern District of California, Central Division.

Therefore, no matter by which name the millsite is known, the millsite against which the charges are brought is clearly identified in the contest complaint served upon each of the contestees.

The charges against the millsite are that (a) the claim has not at any time been used or occupied for mining, milling, processing or beneficiation purposes in connection with any vein or lode, and (b) the claim has not at any time had any quartz mill, reduction, processing or beneficiation works thereon. Such charges when proven require a determination that the millsite is null and void. See United States v. S. M. P. Mining Company, 67 I.D. 141 (1960). Thus, since the charges are taken as admitted, the Acting Land Office Manager properly found that the millsite is invalid where no answer was filed. See United States v. Henry Gilligan et al., A-28857 (February 19, 1962); United States v. J. Hubert Smith, 67 I.D. 311 (1960).

The appellants on appeal, in substance, contend that the present contest was improperly brought against the Capital Springs millsite because it is asserted to have been involved in previous contests, Los Angeles Contest Nos. 6-717, 6-718 and 6-719. In resolving an appeal concerning these contests, the Department rendered decision Grace E. Hutchins, A-29297 (Supp. II) (May 25, 1964), which, in footnote 2 in pertinent part, reads as follows:

> Also, the appellant has listed the Capital Spring Millsite in her appeals. In the land office decision of July 17, 1961, it was held that no adjudication by the Bureau is involved with respect to that "claim" as a copy of its recordation showed that it was merely an application for a water right to be used for mining purposes and was filed to comply with the State water law rather than being a notice of mining location. Appellant has offered nothing to dispute this. Therefore, the statement by the land office remains the Department's position with respect to that alleged claim.

The present contest does not reflect a change of position that the Capital Springs millsite is not a millsite location, but merely an application for a water right. Nevertheless, when the Bureau determined to initiate contest proceedings against the purported location known as the Copper Gulch millsite, since the contest involved the same land as that embraced within the purported Capital Springs millsite, the contested millsite was properly identified under both names and all known persons claiming a millsite interest in the land in issue were properly included as contestees. For the purposes of the Government, a decision determining the validity or nonvalidity of the purported millsite embracing the land would have the same effect, whether located as the "Copper Gulch millsite" or as the "Capital Springs millsite." In the event the contestees deemed the charges contained in the contest complaint against the millsite under either name to be erroneous, it was necessary for the claimants to deny such charges, under departmental regulations, or the charges are deemed admitted. The appellants did not file an answer and the Copper Gulch millsite or the Capital Springs millsite was properly declared null and void.

For the reasons stated the decision of the Acting Land Office Manager is affirmed.

The appellants have stated a desire to have their administrative remedies processed expeditiously; consequently, this decision has been prepared for approval of the Department and, upon such approval, the decision constitutes the final administrative determination of the Department in this matter. See 43 CFR 1844.1.

James F. Doyle
Chief, Office of Appeals and Hearings

Approved: December 4, 1964

John A. Carver Jr.
Assistant Secretary of the Interior

DISTRIBUTION

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Mrs. Margaret G. Jones
Mrs. Mary K. Jones
Mrs. Nellie T. Carthy
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Div. of L&M S&T (4)
Div. of L&M PM (2)
Gower Federal Service
Appeals List No. 1
JHO'D

[illegible]

Contest Nos. [illegible]
[illegible]
[illegible]

United States of America
v.
[illegible] Hutchins et al.

Approved January 8, 1965

Mining Claims: Determination of Validity

Resort to condemnation in order to obtain possession of land embracing a mining claim does not preclude the United States, as landowner, from adjudication of the validity of the claim by administrative procedure.

When title to lands embracing mining claims is in the United States, the Department of the Interior has jurisdiction to make an administrative determination as to the validity of such claims.

The alleged fact that another Department of the Government has been offering to compensate mining claimants for the loss of [illegible] is not a determination that there is a valuable mineral deposit found within the boundaries of its mining claim such as is necessary in order to support a determination that the claim is valid.

There is a distinct difference between exploration and discovery under the mining laws, and only when exploratory work shows minerals in sufficient quantity and quality that there is a reasonable prospect of success in developing a paying mine has a discovery been made.

A geological inference is not a substitute for the discovery of a valuable mineral deposit within the boundaries of the mining claim.

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
DOCKET FILES

1965 JAN 18 AM 10 00

Contest Nos. 0170969-C-3
0170969-C-4
(Riverside)

United States of America
v.
Grace E. Hutchins *et al.*

Approved January 8, 1965

Mining Claims: Determination of Validity

Resort to condemnation in order to obtain possession of land embracing a mining claim does not preclude the United States, as titleholder, from adjudication of the validity of the claim by administrative procedure.

When title to lands embracing mining claims is in the United States, the Department of the Interior has jurisdiction to make an administrative determination as to the validity of such claims.

The alleged fact that another Department of the Government may have offered to compensate mining claimants for the loss of their *pedis possessio* is not a determination that there is a valuable mineral deposit found within the boundaries of the mining claim such as is necessary in order to support a determination that the claim is valid.

There is a distinct difference between exploration and discovery under the mining laws, and only when exploratory work shows minerals in sufficient quantity and quality that there is a reasonable prospect of success in developing a paying mine has a discovery been made.

A geological inference is not a substitute for the discovery of a valuable mineral deposit within the boundaries of the mining claim.

In reply refer to:
704
Los Angeles Contest
Nos. 0170969-C-3
0170969-C-4
(Riverside)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

December 22, 1964

DECISION

United States of America, Contestant v. Grace E. Hutchins, formerly Grace Martin, and Margaret J. Jones, also known as Margaret G. Jones,[1] Appellants-Contestees	:	Wonder, Marsey, Marsey Nos. 1, 2, 3, 4, 5, and 6, and Comet Mining Claims located in secs. 5, 7, 8 and 9, T. 30 S., R. 45 E., M. D. Mer., California.

Decision Affirmed

The above-named appellants have jointly appealed from the Chief Hearing Examiner's decision, dated August 14, 1964, declaring the above-identified lode mining claims null and void for the stated reason that there has not been a discovery of a valuable mineral deposit within the boundaries of any of the claims.

A hearing was held on March 24 and 25, 1964, before the Chief Hearing Examiner, the Government being represented by the Office of the Regional Solicitor, Department of the Interior. Both of the appellants appeared and testified, and were represented by respective counsel. The decision appealed from was based upon the record as compiled at the hearing.

All of the mining claims are within the Mojave "B" Naval Reservation, and, subsequent to the purported location of each of the claims, the area embracing the claims was withdrawn from further occupation and location pursuant to the general mining laws by the actual possession of the land by naval personnel on approximately September 2, 1943. Thereafter, the mining claims have been the subject of condemnation proceedings initiated by the Government (Civil Action

---

[1] The other contestees named in the contest complaints did not answer or otherwise appear in these proceedings; consequently, the Chief Hearing Examiner's decision was final as to such contestees.

Nos. 3129-PH and 769-60-Y, District Court for the Southern District of California, Central Division, at Los Angeles, California).

In a case involving similar facts, the United States Supreme Court held that resort to condemnation in order to obtain possession of mining claims does not preclude the United States, as titleholder, from adjudication of their validity by administrative procedure. *Best et al.* v. *Humboldt Placer Mining Company and Del de Rosier*, 371 U. S. 334 (1963). The appellants, in their present appeal, contend that the *Best* case, *supra*, is distinguishable, because, they assert, that in the condemnation proceedings, the United States, through the U. S. Attorney, conceded that the mining claims in issue, except the Wonder mining claim, had a use value of $50 a year. Pursuing this argument, the appellants urge that if the Government placed a use value on the mining claims in a Court proceeding, the Government has, in effect, conceded the validity of such mining claims and the Department of the Interior thereafter has no jurisdiction to determine the validity of such claims.

Justice Douglas points out in the *Best* decision, *supra*, that the determination of the validity of claims against public lands was entrusted to the Department of the Interior on its creation in 1849, and that Congress has prescribed the process by which claims against the public domain may be perfected, and that the United States which holds legal title to the lands can prescribe the procedure which any claimant must follow to acquire rights in the public sector. Then the *Best* decision, *supra*, summarizes, "The United States is not foreclosed from insisting on resort to the administrative proceedings for a determination of the validity of those claims." The purpose of the contest proceedings, as stated in the *Best* decision, *supra*, is an administrative remedy for litigating the issue of title. Without investigating to learn whether the U. S. Attorney did stipulate that nine of the mining claims in issue had a use value for the apparent purpose of attempting to settle the condemnation proceedings, as long as legal title to the lands embraced within the mining claims remains in the United States, the Department of the Interior has jurisdiction to make an administrative determination as to the validity of the claims.

Moreover, placing a value for the use of the land is in no manner a determination as to the purported discovery of valuable mineral deposits within such land; it is merely an offer of compensation for the denial of the use for which the claimants were in possession of the land. While exploring public land in the hope of making a valid discovery a prospector has no vested interest in the land, but merely the right of *pedis possessio*. Although *pedis possessio*, without a valid discovery, does not give the prospector any right against the United States such as would prevent the Government from withdrawing the land being prospected (see *United States* v. *Everett Foster et al.*, 65 I.D. 1 (1958)), the fact that the Department of the Navy may have offered to compensate the appellants for the loss of their *pedis possessio* in order that the condemnation proceedings might be expedited, is not a determination that there is a valuable mineral deposit found within the boundaries of each of the mining claims such as is necessary in order to support a determination that the mining claims are valid within the purview of the general mining laws. The issue as to whether the mining claims are valid within the purview of the general mining laws has not been determined in the pending condemnation proceedings, and that issue was properly considered and determined by the Chief Hearing Examiner in the contest proceedings. Furthermore, the Chief Hearing Examiner properly denied the proposed finding of fact relating to compensation by the Court under the condemnation proceedings for any loss by the mining claimants which may have been occasioned by the occupancy of the land embracing the claims by naval personnel.

On appeal, the appellants assert, in substance, that at the hearing they made a showing that sufficient minerals had been found upon each of the mining claims in issue to justify a reasonable prudent man to further explore in the hopes that greater quantities of mineral might be discovered, or that better quality mineral might be exposed, such as would constitute a valid discovery within the purview of the general mining laws. The appellants assert that such a showing that further exploration was warranted required the Chief Hearing Examiner to dismiss the contests.

The Department has consistently held that there is a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. It is only when the exploratory work shows that minerals exist in such quantities and such values that there is a reasonable prospect of success in developing a paying mine that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. See United States v. Richard C. Porter et al., A-29882 (April 24, 1964), and the cases cited therein. A mere showing that there are minerals on the claim is insufficient to constitute a discovery under the mining laws. United States v. Spar Mining Company et al., A-28786 (July 30, 1962). Even though facts may raise a geological inference that there are valuable mineral deposits to be found on the claims, the Department has never accepted such inference as a substitute for the discovery of a valuable mineral deposit within the boundaries of the purported mining claims. See United States v. Melvin L. Nevitt, A-30030 (July 28, 1964), and the cases cited therein.

The testimony adduced at the hearing is amply summarized in the Chief Hearing Examiner's decision. Briefly such testimony shows as follows:

Expert Government witnesses testified that the deposit of wollastonite found on the Wonder mining claim is small, the surface samples of the material contain too much impurities, and no market for wollastonite existed in California until after the land in issue had been withdrawn from mineral development. There was testimony that the wollastonite might be of purer quality at depth, but this is merely a geological inference and until commercial quality material is exposed there is no showing of a valid discovery.

An adit was started on the Marsey mining claim and driven toward a vein on the Marsey No. 1 claim, but the vein was never exposed on the Marsey claim. On the Marsey No. 1 claim, float rock was found containing scheelite, and scheelite and other minerals were found in the vein on this claim. However, the expert Government witness testified that unless the vein became wider than the 17-inch vein exposed, a mining operation for 2½% tungstate would be marginal. Thus, again the Marsey No. 1 claim warranted further exploration, but such a showing is not sufficient to constitute a valid discovery. Again, as to the Marsey claim there is nothing but a geological inference which at best could merely justify further exploration in the hope of possibly exposing a valid discovery.

The testimony adduced at the hearing clearly shows that the minerals found upon the Marsey Nos. 2, 3, 4, 5 and 6 mining claims were in little stringers, and were not of sufficient value to mine. There was no evidence showing a valid discovery on these mining claims.

The assay of grab samples removed from the Comet mining claim showed minerals of negligible value. Mrs. Hutchins testified that the locator of the claim had taken a sample from this claim which assayed 1.5% tungstic oxide, but she was unable to produce the assay report at the hearing or in connection with this appeal. There was no evidence produced at the hearing which would support changing the Chief Hearing Examiner's finding that a valid discovery has not been made on this claim.

We do not agree with the appellants that the evidence offered and received at the hearing was sufficient to require a finding that the mining claims were valid. The mining claimants had the burden of showing a valid discovery on each of the mining claims in issue, and they have failed to make a showing that would support such a finding. See United States v. Edgecumbe Exploration Company, Inc., A-29908 (May 25, 1964).

Accordingly, the decision of the Chief Hearing Examiner is affirmed.

The appellants have stated a desire to have their administrative remedies processed expeditiously; consequently, this decision has been prepared for approval of the Department, and, upon such approval, the decision constitutes the final administrative determination of the Department in each contest. See 43 CFR 1844.1.

John B. Piccolo
Acting Chief, Office of Appeals
and Hearings

Approved: January 8, 1965

Under Secretary of the Interior

DISTRIBUTION

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Div. of L&M S&T (4)
Div. of L&M PM (2)
Administrative Assistant, Hearings
Appeals List No. 1
Gower Federal Service
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DOCKET FILES

Multiple Mineral Development: Act of July 23, 1955: Surface Uses 3512.9

Where the information contained in a verified statement shows on its face, when compared with official Bureau records, that the land was not subject to mining appropriation on the date of the attempted location, no hearing is necessary to determine the legal effect to be given the facts of record.

Where, within the 150 days required by the act of July 23, 1955, a verified statement is timely filed setting forth the information required by the act in connection with determining the surface resources on an unpatented mining claim, the determination as to whether an allegedly mistaken reply on the verified statement may be corrected after the 150-day period has elapsed is a matter of administrative discretion.

The verified statement will be rejected unless it contains the information required by the act of July 23, 1955.

William T. Poates and Liane Poates, Sacramento PL 37-7 (January 15, 1965)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 JAN 25 AM 10 00

In reply refer to:
704
Sacramento PL 37-7
(P. L. 167)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

January 15, 1965

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

William T. Poates and Liane Poates	:	Queen Mining Claim located in E½SE¼ sec. 10, W½SW¼ sec. 11, T. 18 N., R. 10 E., Mount Diablo Mer., California, within the Tahoe National Forest

Decision Vacated; Case Remanded

e above-named appellants have appealed 1/ from a decision of the land office at Sacramento, California, dated May 22, 1964, determining the above-named mining claim to be null and void by reason of information submitted by the appellants in their verified statement showing that the mining claim was located on September 14, 1929, since the lands within the mining claim were not subject to appropriation under the general mining laws on the alleged date of location.

e lands were withdrawn from such location and classified for powersite purposes in powersite classification No. 183 (California No. 55), effective June 3, 1927. See section 24 of the act of June 10, 1920 (16 U.S.C. 818 (1958)). Consequently, the lands were not subject to location at the time of the attempted location of the Queen mining claim on September 14, 1929.

Pursuant to the request of the Forest Service, United States Department of Agriculture, notice was published in accordance with the act of July 23, 1955 (30 U.S.C. § 611 et seq. (1958 ed. and Supp. III)), requiring mining aimants on designated lands within the Tahoe National Forest to file, within 150 days from the date of first publication of such notice, a verified statement setting forth (1) the date of the mining location, (2) the book and page of recordation of the location notice, (3) the land description of the mining claim, (4) whether the claimant is a locator or purchaser under the location, and (5) the name and address of the claimant and of any others claiming any interest in such mining claim. See section 5 of the act (30 U.S.C. § 613 (1958)).

1/ The appeal was reinstated by departmental decision, William T. Poates et al., A-30371 (November 23, 1964).

If a verified statement is filed as required by the statute, and an investigation reveals a question as to whether or not a valid discovery and location was made prior to July 23, 1955 (the effective date of the statute), then a hearing is ordered to determine the right, as between the United States and the mining claimant for as long as the mining claim remains unpatented, to the surface resources of the claim in accordance with section 4 of the act (30 U.S.C. § 612 (1958)). However, where the information contained in the verified statement shows on its face, when compared with official Bureau records, that the land was not subject to such appropriation on the date of the attempted location, a hearing is not required to determine the legal effect to be given the facts of record. The Dredge Corporation, 64 I.D. 368 (1957); 65 I.D. 336 (1958).

On May 12, 1958, the appellants filed in the land office their joint verified statement which asserts, in pertinent part, that they claim rights in the vegetative surface resources and other surface resources in the Queen mining claim, which they alleged was located on "9/14/29" and that the location notice was recorded in Book 30 at Page 58. The notice of location submitted shows that one Bert Davidson attempted to locate the Queen mining claim on September 14, 1929, which is after the effective date of the powersite order. Subsequently, Bert Davidson quitclaimed the mining claim to Sadie Davidson, who, in turn, quitclaimed the claim to the appellants.

In the appeal from the land office decision, for the first time it is asserted by the appellants that the mining claim was originally located prior to the withdrawal of the land from mining appropriation on June 3, 1927, and it is contended that it was a valid and subsisting claim from the year of 1901 and perhaps back to an unspecified date in the nineteenth century. The appellants state in their appeal that, given another opportunity such as being allowed a hearing, they can support this assertion with evidence.

Where, within the 150 days required by the act of July 23, 1955, supra, a verified statement is timely filed setting forth the information required by the act in connection with determining the rights to surface resources on an unpatented mining claim, the determination as to whether an allegedly mistaken reply on the verified statement may be corrected after the 150-day period has elapsed is a matter of administrative discretion. See Mr. and Mrs. Ted R. Wagner, 69 I.D. 186 (1962). The verified statement will be rejected, however, unless it contains the required information. See R. D. Compton and Edna Compton, 70 I.D. 12 (1963); R. D. Compton et al., A-30206 (July 2, 1964).

At page 188 of the Wagner decision, supra, it is stated that substantial evidence was submitted by Mr. and Mrs. Wagner to show that the mining claim in issue in that case was in fact located prior to the time the land then in issue had been withdrawn. In the Poates' appeal, no showing beyond unsupported, self-serving statements has been offered as to an earlier uncertain location of the subject mining claim, nor is there a showing that the Poates' have a chain of title from such alleged earlier locator to themselves. However, the appellants should be given an opportunity to submit such a showing prior to a determination as to whether their verified statement is amendable.

The showing required of the appellants in connection with a determination as to whether their verified statement may be corrected to assert an earlier location date appears to be such documents as a notice or notices of location, and instruments of conveyance--evidence usually available through public records which may be submitted without the necessity of a hearing. Accordingly, in the circumstances of the case file as now compiled, a hearing is not now deemed necessary, but a hearing may subsequently be ordered by the land office in light of a further showing.

Accordingly, for the reasons stated above, the decision appealed from is vacated, and the appellants are allowed 30 days from receipt of this decision in which to submit to the Bureau's land office at Sacramento, California, evidence in support of a request to amend their verified statement. The case is remanded to the land office, through the Bureau's State Director for California, for action consistent with this decision and for purposes of proceeding under the act of July 23, 1955, supra.

James F. Doyle
Chief, Office of Appeals
and Hearings

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Mr. William T. and Mrs. Liane Poates
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Division of L&M S&T (4)
Division of L&M PM (2)
Gower Federal Service
Appeals List No. 1
JHO'D

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

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DOCKET FILES

Administrative Procedure Act

Hearing requirements of the Administrative Procedure Act are applicable to hearings on the validity of mining claims. Land office managers are not officers authorized by section 7 of the act to preside at hearings. Hearing procedures before a hearing examiner are compliance with the act.

Mining Claims: Contests 3482

A demurrer or motion to dismiss a complaint in a mining contest, and such motions as one for a more definite statement, are properly considered by a hearing examiner and not a land office manager unless all parties have waived a hearing, there is no conflict between the evidence submitted by the contestees and the contestant, and it is evident that a hearing is not the best means of ascertaining the truth of the charges asserted in the complaint.

United States of America v. Fred W. Burton et al., Sacramento Contest No. 078517 (February 24, 1965)

In reply refer to:
704
Sacramento Contest
No. 078517

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

February 24, 1965

DECISION

United States of America,
Contestant

v.

Fred W. and Ruth L. Burton,
Calvin and Grada Wyatt, and
George and Idabel Crowell,
Contestees-Mining Claimants

Shasta Nos. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11 and 12 Cinder placer mining claims located in sec. 22, T. 42 N., R. 4 W., M. D. Mer., California, within the Shasta-Trinity National Forest.

Decision Vacated; Contest Remanded

The above-named mining claimants have jointly filed an appeal from the land office manager's decision, dated December 3, 1964, dismissing a demurrer filed by Mr. Burton, and denying a motion to dismiss the contest complaint and denying in part a motion for a more definite statement filed on behalf of Mrs. Crowell.

At the request of the Forest Service, United States Department of Agriculture, contest proceedings were initiated by the land office manager against the above-identified mining claims. The charges contained in the contest complaint and the amended contest complaint[1] are that the lands covered by the above-identified mining claims are nonmineral in character and a discovery of a valuable deposit of a locatable mineral does not presently exist within the limits of any of the mining claims.

On November 9, 1964, a joint answer to the original complaint was filed by Mrs. Burton and Mr. Crowell. On June 22, 1964, Mr. Burton had filed a separate answer, and he has subsequently filed an answer to the amended complaint.

---

[1] The motion for a more definite statement (and a similar motion filed by Mr. and Mrs. Wyatt), in part, requests designation of the place of recordation of the location notices. On the same day the manager rendered his decision, in response to this request for information, the manager issued an amended complaint showing that the location notices are recorded in Book 67, at the pages listed, of the Book of Mining Claims in Siskiyou County.

In their appeal, the appellants have, in substance, questioned whether, within the purview of the Administrative Procedure Act (5 U.S.C. § 1001 et seq. (1958)), the land office manager, being the one who issued the contest complaint, is a proper official to consider the demurrer and motions attacking the sufficiency of that complaint.

Under pertinent departmental regulations if an answer is filed and unless all parties waive a hearing, the manager will refer the case to a hearing examiner (43 CFR 1852.1-7(b), 1852.2-2, and 1842.3-1). Since answers had been filed in the present case, the cited regulations precluded the manager from further consideration of the contest and he had no authority to render the decision appealed from.

Even though an answer had not been filed, consideration of the motions filed by the contestees should be left to the Hearing Examiners for consideration, since such procedure is more compatible with the spirit of the Administrative Procedure Act, supra. In United States v. O'Leary et al., 63 I.D. 341 (1956), at pages 343 and 345, the Department held that hearing requirements of the Administrative Procedure Act, supra, are applicable to hearings on the validity of mining claims, and that land office managers are not officers authorized by section 7 of the act to preside at hearings. In United States v. O'Leary et al., 66 I.D. 17 (1959), the Department held that hearing procedures before a hearing examiner are compliance with the Administrative Procedure Act. Since the O'Leary decision in 1956, it has been accepted practice for the Hearing Examiner to consider motions such as those filed by the contestees. Note that a hearing examiner ruled on the motions to dismiss discussed in United States v. William A. McCall et al., A-29161 (July 30, 1962) and in Newell A. Johnson et al., 70 I.D. 388 (1963).

United States v. Keith V. O'Leary et al., Sacramento Contest No. 5168 (December 24, 1952) (approved by the Department), and United States v. Al Sarena Mines Inc., 61 I.D. 280 (1954) are cases in which land office managers considered motions to dismiss in contest cases, but these decisions were prior to the O'Leary decision of 1956, supra, when the question as to the authority of land office managers in contest proceedings was first considered and resolved by the Department in the negative. Since the O'Leary decision of 1956, it is no longer proper for land office managers to consider motions or other pleadings filed in contest proceedings, unless all parties waive a hearing. Even though all parties waive a hearing, such a request will not be acceded to, and the contest is referred to a hearing examiner where there is a complete conflict between the evidence submitted by the contestees and the field reports, or it is evident that a hearing affords the best means of developing the true facts. See United States v. Barron, 64 I.D. 360 (1957).

Another purpose for having Hearing Examiners consider such motions as those in issue is that, under the regulations (see 43 CFR 1852.3-1), a hearing examiner can hold a prehearing conference for resolving such motions. For example, at such a conference the information sought in a motion for a more definite statement may be supplied.

For the reasons stated, without consideration of the merits of the decision from which the purported appeals have been taken,[2] the land office manager's decision is vacated. The contest is remanded to the land office at Sacramento, through the Bureau's State Director for California, for processing leading to the assignment and transmittal of the contest to the office of the Hearing Examiners for appropriate consideration and action.

In view of the action taken, the other issues raised by the mining claimants are moot and need not be considered at this time.

James F Doyle
Chief, Office of Appeals
and Hearings

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Forest Service, Division of Recreation
  and Land Uses, U.S.D.A. (2)
Div. of L&M S&T (4)
Div. of L&M PM (2)
Administrative Assistant, Hearings
Gower Federal Service
Appeals List No. 1
JHO'D

2/ An order denying such motions as those filed by the contestees is interlocutory and not appealable prior to the rendering of a decision on the merits. See United States v. McCall, supra.

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1965 MAR 1 AM 10 00

appeal to Sec
affirmed
A-30474
1-18-66

DOCKET FILES

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 APR 8 PM 2 27

Mining Claims: Discovery 3413

Mining claims are properly declared null and void where the evidence indicates that a discovery of valuable minerals has not been made on the claims.

Hearings Procedure: Appeals to Director (Request for New Hearing) 1852.3-9

The evidence upon which a request for a new hearing is based will be examined to determine whether it is of sufficient weight to warrant remanding the case for further hearing; a self-serving statement as to the estimated value of a new sample not identified with any of the mining claims involved and without explanation of the manner in which it was taken and how its value was determined is insufficient.

United States v. J. W. Riesing, et al., Contest Nos. 074943-C-1, C-2, C-3 (Sacramento) (March 18, 1965)

In reply refer to:
704
Contest Nos. 074943-C-1, C-2,
C-3 (Sacramento)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

March 18, 1965

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States, Contestant v. J. W. Riesing, Earl C. Cooper, and F. W. Wicker, aka Floyd Whicker, Contestees	:	Lucky, Whicker, and Riesing placer mining claims, situated in Sec. 22, T. 20 N., R. 12 E., M.D.M., Sierra County, California.

Decision Affirmed

J. W. Riesing, Earl C. Cooper and F. W. Wicker, aka Floyd Whicker, have appealed from a decision of a Hearing Examiner, dated January 28, 1964, declaring null and void the Lucky, Whicker, and Riesing placer mining claims for lack of discovery of a valuable mineral on any of the three mining claims.

The contest complaints initiating adverse proceedings against the mining claims charged that the land embraced within the claims is essentially nonmineral in character and that the existence of a deposit of valuable minerals of sufficient quantity to constitute a valid discovery is not shown to exist within the boundaries of the mining claims.

A timely filed answer denied the charges generally and requested a hearing. The mining claimants were served with notice of the date and place of hearing. A motion for continuance was denied by the Hearing Examiner on December 2, 1963. A hearing was held on December 10, 1963 at Sacramento, California, before a Hearing Examiner of the Bureau of Land Management, U.S. Department of the Interior. An appearance on behalf of the contestant was made by an attorney from the Office of the Regional Solicitor, U. S. Department of the Interior, Sacramento, California. Mr. Earl C. Cooper, one of the mining claimants, was present at the hearing. The mining claimants were not represented by counsel. Mr. Cooper did not offer any testimony or evidence at the hearing on behalf of the claimants, neither did he cross-examine the contestant's witness.

The mineral examiner for the contestant testified that he went on the three claims with Mr. Cooper, observed their topography and geology, examined the claims and panned samples at the places pointed out by Mr. Cooper. He testified that on the Lucky places he took 6 samples. No colors of gold were observed in 5 samples; Sample No. 2 from the Lucky claim had small colors with an estimated value of 8-3/4 cents a cubic yard. (Tr. 17, 19-20, 31, 34-35). The mineral examiner stated he took 2 samples from the Whicker claim; Sample No. 2 had no values and Sample No. 1 had one color with an estimated value of less than 1 cent a cubic yard. (Tr. 21,30). As to the Riesing, he revealed that he obtained two samples: Sample No. 2 carried no values, while Sample No. 1 consisting of 6 pans of material taken on two different days had 6 colors of gold worth about 11.3 cents or an estimated value of $2.83 per cubic yard. (Tr. 23,27).

In regard to the latter sample and the place from which it was taken (See Exh. 5-A), he stated there wasn't much of a deposit in this area, about 40 cubic yards of gravel and because the river is deep and narrow with huge boulders, one could get very little equipment in there. The Government's witness stated as to all the claims involved that he was of the opinion that there does not exist within the boundaries of the claims a discovery of a mineral in such quality and quantity as to justify a person of ordinary prudence in expending his time and money with a reasonable prospect of developing a valuable mine. His reasons were that the gravel is so small in amount, the grade of the river is steep, the river bed is narrow and full of large boulders difficult and too costly to handle, that it would be difficult to divert the water from the stream bed, and that the claims are several miles upstream from any important gold production. (Tr. 36-37, 39-40).

The Hearing Examiner in his decision summarized the testimony of the Government's mining engineer and stated the rule of discovery laid down in Castle v. Womble, 19 L.D. 455 (1894). He properly found that the Government had established a prima facie case. Since no testimony or other evidence was offered on behalf of the contestees or mineral claimants to refute the evidence presented by the contestant and to show a discovery of a valuable mineral deposit on any of the three mining claims involved, the Hearing Examiner correctly held the Lucky, Whicker and Riesing placer mining claims null and void for lack of a discovery.

The mining claimants on appeal assert generally that the decision of the Hearing Examiner is unjust. The mining claims involved are unpatented; the title to the lands is in the United States. So long as the legal title remains in the Government it does have the power, after due process, which includes proper notice and a hearing, to determine whether a claim is valid and, if found invalid, to declare it null and void. Best et al., v. Humboldt Placer Mining Co. et al., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920).

In the instant proceedings the record shows that the contest complaints, containing the charges against the mining claims, were served on the mineral claimants as provided in departmental regulations. Subsequently, each was served with notice of the scheduled hearing. Thereafter, a hearing was had on the date and at the place stated in the notice of hearing. The record shows that the mining claimant who was present at the hearing stated no evidence or testimony would be offered on behalf of the contestees. He refrained from cross-examining the Government's mineral examiner when given the opportunity. The contestees were given due notice of the hearing, and it was had in conformity with due process, affording them the opportunity to offer evidence and testimony for the purpose of establishing the validity of their claims. Nevertheless, they chose to remain silent. In the circumstances, the Hearing Examiner properly rendered his decision on the contest record made at the hearing which is the sole basis for decision where a hearing has been held. 43 CFR 1850.0-8; Sec. 7(d) Administrative Procedure Act, 5 U.S.C. § 1006 (1958). It is concluded that the record made at the hearing, which we have carefully reviewed, supports the finding of the Hearing Examiner that the claims are invalid for lack of discovery of a valuable mineral deposit on any of them. The assertion that the decision is unjust is incorrect. See United States v. Charles P. MacKenzie, A-28659 (November 1, 1961).

Mr. Cooper requests a new hearing. He states that the reason the Government's mineral examiner could find no place where the contestees did any discovery work was that the river rises 10 to 15 feet in the canyon where such work was done each year and the high water washes out all traces of such work along the banks. In his request he states the contestees will go in with a suction dredge and work the banks and riverbed on all three claims and produce gold on a paying basis. Mr. Cooper also furnished a copy of a letter addressed to him, dated July 9, 1964, signed by J. W. Riesing, one of the mining claimants, wherein he states:

> I am sending you the results of our panning one cubic foot of underwater soil and sand up above Sierra City on our property.
>
> Results are as follows:
>
> .0116 Troy ounce of Gold per cubic foot
> .3132 Troy ounces of Gold per cubic yard
>
> Value of gold in one cubic yard of material at $35.00 per Troy ounce is $10.962.

The letter written by Mr. Riesing has been carefully considered. No statement is made as to which claim the sample was taken from, or when, where and how it was taken, and as to the basis for the estimated value of the sample. It is concluded that the letter is merely a self-serving statement and is not of sufficient weight to warrant a new hearing in the matter. United States v. Maurice Constant, A-27779 (December 30, 1958). The request for a new hearing is denied.

Accordingly, the decision of the Hearing Examiner declaring null and void the Lucky, Whicker and Riesing placer mining claims is hereby affirmed.

Messrs. Riesing, Cooper and Whicker are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of LLand Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers the 3 mining claims adversely affected by this decision the total filing fee will be $15. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

If an appeal is taken the adverse party to be served is:

Regional Solicitor
U. S. Department of the Interior
P. O. Box 21-4527
Sacramento, California 95821

James F. Doyle
Chief, Office of Appeals
and Hearings

Enclosures

Dist. on page 5

DISTRIBUTION:
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Div. of L&M PM (2)
Gower Federal Service
Appeals List No. 1
WHW

appeal to see
set aside &
remanded
A-30476
3-24-66

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BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1965 APR 8 PM 2 27

DOCKET FILES

Hearings Procedures: (Service of Notice of Hearing) 1850.0-6

Where a notice of hearing addressed to the contestee's address of record is sent by certified mail and returned by the post-office marked "unclaimed", the notice of hearing will be considered to have been constructively served.

Hearings Procedures: (Postponements) 1852.3-3

Where a Hearing Examiner allowed the president of a corporate contestee until a date prior to the hearing within which to substantiate his request for postponement of the hearing and where no such evidence was before the Examiner on the date and at the place of hearing and no appearance was made at the hearing on behalf of the contestee reiterating or substantiating the request for postponement, it cannot be said that the Hearing Examiner abused his discretion in proceeding with the hearing; accordingly, a request for a new hearing on appeal will be denied.

United States v. Asbestos Development Corporation, Contest Nos. 076236-C-1, C-2 (Sacramento) (March 29, 1965)

In reply refer to:
704
Contest Nos. 076236-C-1
and 076236-C-2 (Sacramento)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

March 29, 1965

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States, Contestant	:	Blue Rock Mine, Blue Rock Mine Nos. 2 through 16 placer mining claims and Water-Hole mill site situated in Secs. 1, 2, 3, 11, 12, T. 24 S., R. 6 E., and Sec. 35, T. 23 S., R. 6 E., M.D.M., California, and recorded in Book 1479, pages 532 and 538 to 563 of the Monterey County Official Records.
v.	:	
Asbestos Development Corporation, Contestee	:	

Decision Affirmed

The Asbestos Development Corporation has appealed from a decision of a Hearing Examiner, dated February 20, 1964, declaring the Blue Rock Mine and Blue Rock Mine Nos. 2 through 16 placer mining claims null and void for lack of discovery of a valuable mineral on any of the 16 claims, and holding the Water-Hole mill site invalid on the basis that it has not been used for mining purposes.

The contest complaint against the placer mining claims charged that the land embraced within the claims is nonmineral in character and that the existence of a deposit of valuable minerals of sufficient quantity to constitute a valid discovery is not shown to exist within the boundaries of each of the mining claims. The contest complaint against the mill site location charged that the land embraced within the mill site location is not being used for mining or milling purposes.

The contest complaints were served on the contestee on July 24, 1963. Mr. Maurice E. Gomes, President of the Asbestos Development Corporation, requested an extension of time within which to answer the complaints. His stated reasons were that a stockholders meeting had to be called and that further information and documents had to be obtained before filing an answer. The time within which to file an answer was extended to September 24, 1963. On August 23, 1963, the contestee by its president filed answers denying the charges generally. A notice of hearing, dated and postmarked October 22, 1963, directing the parties to the contests to appear at a hearing before a Hearing Examiner on December 6, 1963, in the New Mint Building, San Francisco, California, was sent by certified mail to the contestee at its address of record, in care of Mr. Gomes. The certified mail containing the notice of hearing was returned on November 14, 1963, to the Office of Hearing Examiners in Sacramento marked "Unclaimed." On the same day the Hearing Examiner wrote a letter to the contestee, addressed in the same manner as the certified mail, stating what had occurred and that under departmental regulations the mailing and return of the notice of hearing in the instant case constituted constructive service. A copy of the notice of hearing was enclosed.

On November 20, 1963, there was received in the Office of Hearing Examiners at Sacramento a letter from Mr. Gomes acknowledging receipt of the letter of November 14, 1963, together with the notice of hearing. He stated he was unable to receive the certified mail dated October 22, 1963, returned undelivered, because he was recuperating for several weeks from a heart ailment and upon his return to his office he found the certified mail slip. He called the Post Office to learn that the certified letter was returned to the sender. He requested additional time to prepare for the hearing. Noted on this letter with respect to such request is the following: "Denied by telephone, 11-26-63. JAW."

The case record further shows that on December 6, 1963, the day of the hearing in San Francisco, there was received in the Office of the Hearing Examiners at Sacramento a letter from a secretary in the office of the contestee at Los Angeles. She explained that at the request of Mr. Gomes she was forwarding a doctor's statement and added that Mr. Gomes was to see his doctor on the 6th of December for a blood check and count. The statement of Dr. Killeen of Los Angeles, dated December 2, stated that Mr. Gomes has been under his care and because of his medical problems it is not advisable for him (Gomes) to make the trip to San Francisco at this time.

The hearing was held on December 6, 1963, at San Francisco, California, as scheduled. An appearance on behalf of the contestant was made by an attorney from the Office of the Regional Solicitor, U. S. Department of the Interior, Sacramento, California.

At the outset of the hearing the Hearing Examiner stated:

> Let the record show that Mr. Maurice Gomes is President of Asbestos Development Corporation and that on November 26, 1963, he requested a continuance of the hearing which was denied by telephone and he was advised that if any further reasons existed for the postponement of the hearing he was to notify the Hearing Examiner by telephone or telegram prior to the week of December 2.

> Let the record further show that there is no appearance by or on behalf of the Contestee . . . . (Tr. 3-4).

The testimony and evidence adduced at the hearing are adequately summarized in the decision of the Hearing Examiner and will not be narrated here. The Hearing Examiner found that the contestant's evidence, consisting of its mining engineer's testimony of his detailed examination and sampling of the mining claims, his opinion that there is no valuable mineral upon any of the claims, and his observation that the mill site is not being used for mining or milling purposes, established a prima facie case. The Hearing Examiner further found that the contestees failed to sustain the burden of proving a valid discovery and no evidence was offered to refute the testimony and evidence of the contestant. The Hearing Examiner declared the 16 placer claims and mill site involved invalid.

The contestee on appeal contends that it was not given an adequate opportunity to prepare for and attend the hearing, that there was no constructive service of notice of hearing, and that the Hearing Examiner abused his discretion in failing to postpone the date of hearing after he was advised of the physical condition of Mr. Gomes. The contestee requested a new hearing.

The departmental regulations provide that the Hearing Examiner shall fix a place and date of hearing and notify all parties and the Bureau at least 30 days in advance of the date set. 43 CFR 1852.3-2. The regulations further provide with regard to service of documents:

> Where the regulations in this part require that a copy of a document be served upon a person, service may be made by delivering the copy personally to him or by sending the document by registered or certified mail, return receipt requested, to his address of record in the Bureau. 43 CFR 1850.0-6(e)(1).
>
> * * *
>
> A document will be considered to have been served at the time of personal service, of delivery of a registered or certified letter, or of the return by the post-office of an undelivered registered or certified letter. (Emphasis added). 43 CFR 1850.0-6(e)(3).

In compliance with the regulation the Hearing Examiner set a date and place of hearing and sent the notice of hearing to the contestee at its address of record in the Bureau, more than 30 days in advance of the hearing. Although the notice sent by certified mail was returned unclaimed, under the regulations, the contestee was constructively served with notice of hearing. The Hearing Examiner's further communication and mailing of a copy of the notice of hearing in no way affected the constructive service of the original service of the notice of hearing. The fact that the original notice of hearing was returned was due to the failure of the contestee's president to make provision for the receipt of mail at all times at the address of record. The Department has long held that a notice or document which is mailed to an address of record is constructively served on the party involved when delivery is attempted at that address. Betty Ketchum, 67 I.D. 40 (1960), and cases cited therein.

Concerning the request for postponement or continuance of the hearing, in his affidavit accompanying the contestee's statement of reasons, Mr. Gomes acknowledges that the Hearing Examiner called him and in his telephone conversation stated to him that the hearing would be continued if he (Gomes) would submit a letter from a doctor relative to his heart ailment and inability to travel. The case record and hearing transcript show that the telephone call was made on November 26, 1963. At that time Mr. Gomes was advised to notify the Hearing Examiner prior to December 2, 1963, by telephone or telegraph of further reasons for postponement of the hearing. It was not until December 4, 1963, that the air mail communication was sent by a secretary of the contestee, forwarding the doctor's statement of December 2 to the Office of the Hearing Examiners at Sacramento. It arrived in Sacramento on December 6th, the date of the scheduled hearing in San Francisco. In the circumstances and since no appearance was made on behalf of the contestee at the hearing to reiterate the request for postponement, it cannot be said that the Hearing Examiner abused his descretion in proceeding with the hearing. As a consequence, the request for a new hearing is denied.

The record made at the hearing has been carefully reviewed. It is concluded that the findings of the Hearing Examiner are supported by the testimony and evidence adduced at the hearing. The Hearing Examiner properly declared the Blue Rock Mine, Blue Rock Mine Nos. 2 through 16 placer mining claims and the Water-Hole mill site null and void. Accordingly, the decision appealed from is affirmed.

Asbestos Development Corporation is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim and mill site included in the appeal. If the appeal covers all the mining claims and the mill site adversely affected by this decision the total filing fee will be $85. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, wherein the decision appealed from is in error.

In the event an appeal is taken the adverse party to be served is:

Regional Solicitor
U. S. Department of the Interior
P. O. Box 21-4527
Sacramento, California

James F. Doyle
Chief, Office of Appeals
and Hearings

Enclosure

DISTRIBUTION:
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Regional Solicitor, U.S. Department of the Interior
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Administrative Assistant, Hearings
Div. of L&M, S&T (4)
Div. of L&M, PM (2)
Gower Federal Service
Appeals List No. 1
WHW

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 MAY 11 PM 2 31

appeal to Sec
dismissed 9-10-65
A-30489

DOCKET FILES

Mining Claims: Discovery 3413

Lode mining claims are properly declared invalid and the application for the patenting of them is properly rejected where the evidence does not disclose the existence of discoveries on the claims at the present time.

Mining Claims: Patents (Generally)

An application for a mineral patent will be rejected where it is not shown as a present fact that the mining claims involved are valuable for their mineral content.

United States v. W. H. Whetnall, Contest No. 060717 (Sacramento) (April 26, 1965)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Contest No. 060717
(Sacramento)

BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 MAY 11 PM 2 31

April 26, 1965

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States	:	High Grade Nos. 1, 2 and 3 lode mining claims, situated in Sec. 35, T. 26 S., R. 32 E., M.D.M., Kern County, California.
v.	:	
W. H. Whetnall	:	

Decision Affirmed

W. H. Whetnall has appealed from a decision of a Hearing Examiner, dated February 25, 1964, declaring the High Grade Nos. 1, 2 and 3 lode mining claims null and void on the basis that each lacked a discovery of a valuable mineral deposit within the meaning of the mining laws, and rejecting the mineral patent application Sacramento 060717 for them.

The contest complaint against the lode mining claims charged that the existence of a deposit of valuable mineral of sufficient quantity to constitute a valid discovery is not disclosed within the boundaries of the mining claims. A hearing was had on September 11, 1963.

The claims lie in the Keyesville Mining District. The main mass of rock is Isabella granodiorite. The coarse-grained rock is jointed and has a number of alaskite dikes. It is traversed by northeast-southwest trending stringers and veins which dip fairly steeply to the east. One stringer traverses the High Grade No. 1 claim and another the Nos. 2 and 3 claims. The mineral most frequently referred to is gold.

The entire record made at the hearing, and the appeal, have been carefully reviewed. The testimony and evidence adduced at the hearing have been thoroughly summarized by the Hearing Examiner and need not be repeated here.

The appellant contends that the evidence was to the effect that a valid discovery was made on each claim; that the evidence demonstrates the existence on each claim of veins and lodes of mineral-bearing rock in place having past, present, future and prospective value, not the least of which evidence being mint receipts from sales of gold and silver from this mine; and that the evidence is sufficient to justify a reasonably prudent person now and at the time the application for patent was filed to expend his time and money with a reasonable prospect of success in developing a valuable mine.

The Hearing Examiner found that the contestant established prima facie, by the testimony of its expert witness, based upon reasonable examination of the claims and samplings of accessible workings, that the stringers presently exposed on the claims bear such mineral values and exist in such narrow widths that a prudent person would not be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine. He further found that the weight of the evidence indicates that wider portions of the stringers which may have been found on the claims have long since been depleted and that no stringer or vein presently exposed thereon possesses, in and of itself, a present or prospective value for mining purposes. The Examiner concluded that there are no veins or lodes of rock in place exposed on the subject claims bearing sufficient valuable minerals to justify a reasonably prudent person in the further expenditure of his time and means with a reasonable prospect of success in developing a valuable mine.

It would appear that the appellant is under the erroneous belief that the mere presence of a vein or lode of rock in place bearing some mineral constitutes a discovery sufficient to satisfy the mining laws.

In determining whether there has been a discovery of "valuable mineral" within the meaning of the mining laws it has long been recognized that the mere presence of some mineral is not enough. There must be evidence of the existence of mineral in such quantity and quality that a man of ordinary prudence would be justified in expending his time and money with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894); Cameron v. United States, 252 U.S. 450 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963).

The Hearing Examiner's decision sets out the three elements necessary to establish a valid discovery on a lode mining claim as outlined by the Department in Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912). The Department in Jefferson-Montana also explained that many other factors may enter into the third element, including the size of the vein, as disclosed, the quality and quantity of the mineral it carries, geologic conditions and other like facts, which would all be considered by a prudent man in determining whether or not the vein or lode warrants further expenditure.

With regard to the contention that present, future and prospective value on the claims is evidenced by mint receipts, it is noted that no mint receipts were offered in evidence. In the course of his testimony that he stopped mining the claims in 1942, Mr. Whitnall interjected "we have mint receipts to verify that" and on cross-examination he again mentions mint receipts. (Tr. 112 and 132). Even if the 1942 or earlier mint receipts had been received in evidence, standing alone they would have no evidentiary value concerning the present, future or prospective value of the claims. Where a mint receipt is properly tied to a particular working on a claim, it may tend to show a past discovery; however, a mint receipt by itself or the mention of such receipt is insufficient to show a present discovery which is necessary to validate a mining claim and support a patent application.

It is well established by decisions of the Department and of the courts that a mineral patent cannot be issued solely upon the basis of a past discovery of minerals. Before a mineral patent can be issued it must be shown as a present fact that the claims are valuable for minerals. *United States* v. *Margherita Logomarcini*, 60 I.D. 371 (1949); *Lem A. and Elizabeth D. Houston*, 66 I.D. 161 (1959); *Best* v. *Humboldt Placer Mining Co.*, *supra*.

When a mineral locator or claimant has made a discovery, exploits it fully, and has been protected by the mining laws in his possession and enjoyment of a mining claim, the purpose of the mining laws has been fulfilled. However, a mineral claimant can obtain patent only when the current conditions on his claim satisfy the requirements of the mining laws. The appellant's possessory right might have continued in the absence of any request for patent, but when he applied for a patent he voluntarily assumed the burden of showing that a valid discovery currently exists on the claims. *United States* v. *Eric North*, A-27936 (July 1, 1959).

The United States Supreme Court said, in *Best* v. *Humboldt Placer Mining Co.*, *supra*:

> A locator who does not carry his claim to patent does not lose his mineral claim, though he does take the risk that his claim will no longer support the issuance of patent. *United States* v. *Houston*, 66 I.D. 161, 165. It must be shown before a patent issues that at the time of the application for patent "the claim is valuable for minerals," worked-out claims not qualifying, *United States* v. *Logomarcini*, 60 I.D. 371, 373.

In the instant case, the burden of demonstrating the present validity of the claims must be met. This the appellant failed to do. *United States* v. *LaFortuna Uranium Mines, Inc.*, A-29852 (May 4, 1964).

Accordingly, the decision appealed from is affirmed.

Mr. W. H. Whetnall is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C., 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all of the mining claims adversely affected by this decision the total filing fee will be $15. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1965 MAY 11 PM 2 31

In the event an appeal is taken the adverse party to be served is:

Regional Solicitor
United States Department of the Interior
P. O. Box 21-4527
Sacramento, California 95821

James F. Doyle
Chief, Office of Appeals and Hearings

Enclosures

DISTRIBUTION:

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Mr. W. H. Whetnall
Hearing Examiner Rudolph M. Steiner (Sacramento)
Administrative Assistant, Hearings
Div. of L&M S&T (4)
Div. of L&M PM (2)
Gower Federal Service
Appeals List No. 1
WHW

appeal to Sec.
affirmed A-30488
~~4-19-66~~ Supp. 12-7-66

DOCKET FILES
DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 MAY 6 AM 10 00

Potassium Leases and Permits: Generally 3140
Sodium Leases and Permits: Generally 3150

Potassium and sodium prospecting applications are properly rejected where interested governmental agencies have objected on the basis that such permits would interfere with the administration of the lands for the purposes for which they are withdrawn and where the applicant is seeking to recover the potassium and sodium resources from hot brines in the lands, these being unavailable for such permits at the present time.

Joseph I. O'Neill, Jr., Riverside 01821 etc. (April 28, 1965)

In reply refer to:
704
Riverside 01821, 01822,
01894 thru 01896 and
01931

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

April 28, 1965

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 MAY 6 AM 10 00

Certified Mail
Return Receipt Requested

DECISION

Joseph I. O'Neill, Jr. : Potassium and Sodium

Decision Affirmed as Modified

Mr. Joseph I. O'Neill, Jr. has appealed from the Riverside land office decision of July 10, 1964, rejecting his above-noted potassium and sodium prospecting permit applications as to certain lands in the Salton Sea area reserved for wildlife refuge purposes under Executive Order No. 5498 of November 25, 1930. The land office held that operations under the requested permits would interfere with the purposes for which the lands are withdrawn and reserved. The land office decision was issued after consultation with the applicant and interested governmental agencies to ascertain whether the requested permits might be issued with special stipulations to protect other resources and use values in the lands.

The records indicate that Mr. O'Neill stated in a letter addressed to the land office on March 6, 1964, that the potassium and sodium potential in the lands exists in hot brines and that the extraction thereof would not be by the usual, conventional mining methods but by the drilling of wells without interference with the present uses of the withdrawn lands. On appeal he also states that should the wells prove to be productive of steam or steam and minerals, effluent would be transported to shore by pipeline to be processed in plants outside of the refuge. He contends that in such operations there would be little,if any, disturbance to wildlife in the area. In addition, he requests in the event the lands are not presently available for the requested permits, that his applications and appeals be construed to establish a priority over future applications for the same lands, if and when these lands should become available for such prospecting in the future.

Thus it appears that the applicant is proposing to recover the potassium and sodium resources applied for from hot spring systems in the lands. If such hot springs are in fact existent in the subject lands, it would appear that the hot springs and the resources thereof, as well as the lands, would be reserved as provided by Executive Order 5389 of July 7, 1930, for lease under provisions of the act of March 3, 1925 (43 Stat. 1133). See Solicitor's Opinion M-36625 of August 28, 1961. As to development of the hot springs for electric power purposes, the Opinion indicates that an amendment to the act of March 3, 1925, supra, would be necessary. In this connection it is to be noted that there have been introduced in the 89th Congress, 1st Session, two bills, H.R. 2212 on January 11, 1965, and S. 1674 on April 1, 1965, each entitled "A Bill to authorize the Secretary of the Interior to make disposition of geothermal steam and associated geothermal resources, and for other purposes."

The showing submitted by the appellant has been considered. It is found to be insufficient to establish error in the land office determination not to issue the permits in view of the stated objections thereto by the interested governmental agencies to the effect that such permits would interfere with the administration of the lands for the purposes for which they are withdrawn and reserved. Noel Teuscher et al., 62 I.D. 210 (1955). Although the requested permits are therefore not allowable for the reasons stated in the land office decision, it would appear that they are also not allowable for the reason that the applicant is seeking to recover the potassium and sodium resources from hot brines in the lands, these being unavailable at the present time as set out above.

There is no authority for suspending action on the applications until some future time as of which the lands might possibly be made available for development of the potassium and sodium resources applied for. The appellant's request therefor is denied.

The decision appealed from is affirmed as modified herein.

Mr. Joseph I. O'Neill, Jr., is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each application included in the appeal. If the appeal covers all applications adversely affected by this decision the total filing fee will be $30. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

James F. Doyle

Chief, Office of Appeals
and Hearings

Enclosures

DISTRIBUTION

Mr. Joseph I. O'Neill, Jr. (Certified Mail)
Shell Oil Company
Hon. Pat Minor Martin
Department of Public Works, Imperial County, Calif.
Bureau of Reclamation, Region 3, Boulder City, Nevada
Colorado River Basin Regional Water Pollution Control Board
California Department of Conservation, Sacramento, Calif.
California Department of Fish and Game, Sacramento, Calif.
California Department of Fish and Game, Los Angeles, Calif.
Fish and Wildlife Service, Bureau of Sport Fisheries and Wildlife, Portland, Oregon
Regional Mining Supervisor, Geological Survey
Regional Solicitor, Department of the Interior
Div. of L&M S&T (4)
Div. of L&M PM (2)
Geological Survey, Conservation Division (18)
Geological Survey, Conservation Division, Branch of Mining (18)
Gower Federal Service
Appeals List No. 1
AHO

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1965 MAY 6 AM 10 00

Potassium Prospecting Permits: Generally -- Permit Bond 3142.3

An applicant for potassium prospecting permit must furnish a bond of not less than $1,000 prior to the issuance of a permit.

Elizabeth B. Archer, Utah 0144586 (May 11, 1965)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 MAY 24 AM 10 00

In reply refer to:
704
Utah 0144586

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

May 11, 1965

Certified Mail
Return Receipt Requested

DECISION

Elizabeth B. Archer : Potassium Prospecting
: Permit Application

Decision Affirmed

Elizabeth B. Archer has appealed from a decision dated February 12, 1965, of the Utah land office which required a bond of $1,000 as a condition precedent to issuance of a permit pursuant to the above-identified potassium prospecting permit application.

The appellant avers that the decision is in error in that no bond is required under 43 CFR 3126.1(b) until operations are commenced on the lands under the permit.

The regulation cited by the appellant is not pertinent to the present case; it relates to bonds filed by noncompetitive lessees prior to the filing of a general lease bond in those cases in which a bond is required by law for the protection of the owners of surface rights in the lands. The regulation here concerned is 43 CFR 3142.3, Permit Bond, which clearly provides that an applicant for potassium prospecting permit must furnish a bond of not less than $1,000 prior to the issuance of a permit.

The decision appealed from is affirmed.

Elizabeth B. Archer is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures

DISTRIBUTION

Elizabeth B. Archer (Certified Mail)
Div. of L&M S&T (4)
Div. of L&M PM (2)
Conservation Division, Geological Survey (3)
Gower Federal Service
Office of Program Development
Appeals List No. 1
EG

appeal to Sec
affirmed A-30506
3-28-66

Mining Claims: Discovery

To constitute a valid discovery on a lode mining claim there must be evidence of a lode or vein presently carrying a valuable mineral in such a quantity as would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

A mining claimant whose claim is being contested by the Government is under a duty to keep open for inspection by the Government mineral examiners whatever discovery points he claims exist.

Bee Lambert Barnes, Contest No. 056920 (Sacramento) (May 11, 1965)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 MAY 24 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Contest No. 056920
(M.S. 6571) (Sacramento)

May 11, 1965

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States	:	Pine Tree and Gold Bug lode mining claims situated in Secs. 32 and 33, T. 46 N., R. 9 W., M.D.M., Siskiyou County, California.
v.	:	
Bee Lambert Barnes	:	

Decision Affirmed

Bee Lambert Barnes has appealed from a decision of a Hearing Examiner, dated February 3, 1964, declaring the Pine Tree and Gold Bug lode mining claims null and void on the basis that each lacked a discovery of a valuable mineral deposit within the meaning of the United States mining laws, and rejecting the mineral patent application Sacramento 056920 for them.

The complaint, issued at the request of the United States Department of Agriculture, Forest Service, charged that the existence of a deposit of valuable mineral of sufficient quantity to constitute a valid discovery is not disclosed within the boundaries of the mining claims. A hearing was held on June 21, 1963.

The claims are in the north central part of Siskiyou County on the west fork of McKinney Creek, which traverses the claims in the direction of their long axis. The minerals referred to are gold and silver.

The record made at the hearing and the appeal have been carefully reviewed. The testimony and evidence adduced at the hearing have been amply summarized by the Hearing Examiner and need not be renarrated here.

The Hearing Examiner found nothing in the testimony for the contestee that would tend to refute the testimony of the contestant's mining engineer, who examined and sampled the claims, that a prudent person would not be justified in expending monies to develop the property with the expectation of making a paying mine. The Examiner also found that the contestee's testimony was to the effect that she did not know the amount of gold recovered from these and other claims and that, except for assessment work, the claims have not been worked since 1942. He further found that the testimony of the contestee's husband, who admittedly knows nothing about mining, cannot be construed as having the quality of convincing probative evidence. The Examiner concluded that the contestant has sustained the charge that the existence of a deposit of valuable mineral of sufficient quantity to constitute a valid discovery is not disclosed within the boundaries of either of the claims involved.

The appellant asserts that the Hearing Examiner incorrectly stated that the living for the contestee, her deceased husband, and their family from 1929 to 1942, while operating mining claims, was supplemented by her husband's World War I service pension. The appellant maintains her testimony was to the effect that the pension did not become available until after they stopped working the mining claims; therefore, their living was derived solely from the recovery of gold from the operation of their mining claims. From the record we note that although Mrs. Barnes testified that her deceased former husband, George Lambert, did not receive any pension until after he quit working the claims, she was unable to recall the approximate date he first received his pension. (Tr. 59-61).

While the appellant's assertion is correct, the misstatement of this fact is not a basis for the reversal of the Hearing Examiner's decision, which was predicated on numerous other factors stated in that decision. It would appear that it was the intent of the contestee to establish that prior to 1943 there was a discovery of valuable mineral on the claims involved by showing that the livelihood of the Lambert family was derived from mining. The contestee's testimony indicted that gold came partly from the Gold Bug and partly from the Humdinger group of claims, the latter claims not being involved in this contest. No showing was made as to the amount of gold recovered from the Gold Bug, the Humdinger group, or any of the claims. (Tr. 53-55, 61-62). Consequently, the evidence falls short of showing a past discovery on any of the claims involved in this contest.

The appellant contends that the statement of law as set out by the Hearing Examiner does not pertain to the true facts of the case. The claims involved are lode mining claims, therefore, it was appropriate for the Examiner to set forth the elements necessary to establish a valid discovery on a lode claim as outlined by the Department in Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912). Further, the Examiner pointed out that when a mining claim is challenged it must be shown as a present fact that the land in the claim is valuable for its mineral content. He also correctly stated that a past discovery may be lost through exhaustion of the valuable minerals.

When a mineral locator or claimant has made a discovery, exploits it fully, and has been protected by the mining laws in his possession and enjoyment of a mining claim, the purpose of the mining laws has been fulfilled. However, a mineral claimant can obtain patent only when the current conditions on his claim satisfy the requirements of the mining laws. The appellant's possessory right might have continued in the absence of any request for patent, but when her deceased husband, and now she, applied for a patent she voluntarily assumed the burden of showing that a valid discovery currently exists on the claims. United States v. Eric North, A-27936 (July 1, 1959).

The United States Supreme Court said, in Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963):

> A locator who does not carry his claim to patent does not lose his mineral claim, though he does take the risk that his claim will no longer support the issuance of patent. United States v. Houston, 66 I.D. 161, 165. It must be shown before a patent issues that at the time of the application for patent "the claim is valuable for minerals," worked-out claims not qualifying, United States v. Logomarcini, 60 L.D. 371, 373.

In the instant case, the appellant's testimony was an attempt to show a past discovery. It was therefore proper for the Examiner to point out in his decision that a discovery may be lost through exhaustion of minerals.

It is further contended that the contestant's mineral examiner failed to observe tailings and the Hearing Examiner failed to consider the fact that workings had been covered up by a landslide.

It is values in place that must be established to constitute a discovery on a lode claim, and this cannot be done from an inference that the tailings may have values. United States v. James E. Hubbart, A-30205 (November 27, 1964).

The mining engineer who testified for the Government stated that he sampled all of the points or exposures indicated to him by the contestee or her representatives. (Tr. 5-6). He also stated that a landslide was not evident. (Tr. 42). Nevertheless, it is the duty of a mining claimant whose claim is being contested to keep discovery points available for inspection by Government mineral examiners. The examiners have no duty to rehabilitate discovery points or to make a discovery for the claimant. United States v. David L. and Kathryn King, A-30217 (December 29, 1964).

The testimony of the Government's mineral examiner established prima facie that the Pine Tree and the Gold Bug claims are invalid. The appellant's own testimony concerning the Pine Tree was that it is unknown where the values are. (Tr. 47, 57, 62). Therefore, the Hearing Examiner properly held the Pine Tree claim invalid. The appellant's evidence in regard to the Gold Bug claim falls far short of a showing by a preponderance of evidence that the claim is validated by the presence of mineral in such quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Since the mineral claimant failed to do this, the Gold Bug claim properly was also held to be invalid. Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959).

Accordingly, the decision appealed from, declaring the Pine Tree and Gold Bug lode mining claims null and void and rejecting the patent application for them, is affirmed.

Mrs. Bee Lambert Barnes is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers both the mining claims adversely affected by this decision the total filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

In the event an appeal is taken the adverse party to be served is:

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James F. Doyle
Chief, Office of Appeals and Hearings

Enclosures

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Regional Forester, Forest Service
Office of the General Counsel, Div. of Lands & Forestry, Washington, D. C.
Forest Service, Div. of Recreation & Land Uses, Washington, D. C. (8)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Hearing Examiner John A. Wood (Sacramento)
Administrative Assistant, Hearings
Gower Federal Service
Appeals List No. 1
WHW

appeal to Sec

Affirmed in part;
set aside in part and
Remanded
DOCKET FILES A-30515
7-1-68

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 JUN 15 PM 2 49

Multiple Mineral Development: Act of July 23, 1955: Common Varieties of Minerals 3511

A deposit of stone, which is attractive in appearance and used as a decorative building stone in the construction of interior and exterior walls and fireplaces, because it is not shown to have any uses over and above those of deposits of ordinary building stone is not an uncommon variety of building stone which is locatable under the mining laws.

Mining Claims: Discovery 3413

Where deposits of materials of wide occurrence such as wollastonite, dolomite and limestone have not been prospected or explored to determine their quantity and quality and it has not been shown that the particular deposits are marketable or that they can be mined, removed and marketed at a profit, there is no discovery within the meaning of the mining laws.

United States v. Gene DeZan et al., Contest Nos. 02065 and 02069
(Riverside) JUN - 9 1965

In reply refer to:
704
Contest Nos. 02065 and
02069 (Riverside)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

JUN - 9 1965

Certified Mail
Return Receipt Requested

DECISION

United States, Contestant	:	Driftstone Veneer Nos. 1 and 2, Driftwood No. 2 and Blondie Nos. 1, 2, 3, 4, 5, and 6 placer mining claims situated in Secs. 14, 15, 22, and 23, T. 3 S., R. 19 E., S.B.M., Riverside County, California
v.	:	
Gene DeZan, Jean DeZan, Robert Yeager, Louise Yeager and A. C. Sudekum, Contestees	:	

Decision Affirmed

The above-named contestees have appealed from a decision of a Hearing Examiner, dated January 9, 1964, declaring the Driftstone Veneer Nos. 1 and 2, Driftwood No. 2, and Blondie Nos. 1 through 6 placer mining claims null and void on the ground that each lacked a discovery of a valuable mineral deposit within the meaning of the mining laws.

The contest complaints initiating adverse proceedings against the mining claims charged that the material found within the limits of the claims is not a valuable mineral deposit under Section 3 of the act of July 23, 1955 (69 Stat. 367; 30 U.S.C. 611), and that valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws. A hearing was held on June 25, 1963.

Consideration will first be given to the procedural matters raised prior to the hearing, during the hearing and again on appeal.

The appellants contend that the Hearing Examiner erred in denying their motion to dismiss for the reason that no facts are stated in the contest complaints. The first charge, which is stated above, alleged, in substance, that the material found on the claims is not a valuable deposit under Section 3 of the Act of July 23, 1955. That section of the act commences:

> No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit.

It is abundantly clear from reading the charge together with the referenced section of the act that the material on the claims is alleged to be a common variety no longer deemed a valuable mineral and therefore not locatable after July 23, 1955. The second charge, also stated above, alleged lack of a valid discovery of a valuable mineral deposit within the limits of any of the claims. In one form or another lack of discovery has long been a charge in mining contests before the Department and the courts. Grand Canyon Railway Co. v. Cameron, 36 L.D. (1907); United States, George B. Conway, Intervenor v. Gross, 53 I.D. 115 (1930); Adams v. United States, 318 F. 2d 891 (1963); Mulkern v. Hammitt, 326 F. 2d 896 (1964). Further, under the regulations, 43 CFR 1852.3-1, formerly 42 CFR 221.69, a party to a contest may file a motion for a prehearing conference to consider, inter alia, simplification of the issues, the necessity of amendments to the pleadings, the possibility of obtaining stipulations, admission of facts and agreements to the introduction of documents, and such other matters as may aid in the disposition of the proceedings. The record fails to disclose any motion on behalf of the contestee for a prehearing conference to clarify any alleged confusion or uncertainty created by the charges in the contest complaint. It must be concluded that the charges were adequate and not misleading. The Hearing Examiner's denial of the motion to dismiss, therefore, is affirmed.

The appellants assert that the Hearing Examiner erred in refusing to grant a continuance of the hearing in that the contestees did not have ample time within which to prepare a defense. The record shows that a notice of hearing, received on March 13, 1963, by the contestees' attorney then of record, set the date of hearing for May 22, 1963. On May 6, 1963, there was received in the Office of the Hearing Examiners at Sacramento, California, a request by Mr. DeZan, a contestee, for postponement of the hearing for 30 to 60 days in order to obtain legal counsel. In compliance with the request, on the same day an order issued postponing the hearing until June 25, 1963.

In a letter dated June 11, 1963, the new attorney for the contestees stated that he had recently been retained as counsel and requested a postponement of the hearing scheduled. In reply, on June 13th, the Hearing Examiner pointed out that one postponement was previously granted to allow the contestees additional time to retain legal counsel and in the absence of other grounds, he denied the request. On June 19th a motion for continuance was filed requesting that the hearing date be postponed on the ground of insufficient time to prepare for the hearing on June 25, 1963. At the hearing the Hearing Examiner ruled, that in the absence of any further explanation as to why additional time should be required to prepare this case, the motion was denied. (Tr. 6).

The contestees were allowed one postponement in order to obtain counsel and it is believed that new counsel had sufficient time within which to prepare for the hearing. There is no evidence that the contestees were prejudiced by the disallowance of additional time. Further, the record made at the hearing shows that the Hearing Examiner was admittedly fair when he stated that he would hold the record open for a period of thirty days within which the contestees' attorney could express a desire to submit additional evidence and state the nature of any additional evidence which might be admitted by stipulation or at a hearing on a later date. (Tr. 89-90). The day following the hearing the contestees' attorney, by letter stated they decided not to submit further evidence. It is concluded that the Hearing Examiner's denial of the motion for continuance must be sustained.

The Blondie Nos. 1 through 6 were located in July 1960, and the other three mining claims were located in January 1961. The claims are approximately 10 miles west of Blythe, California, in the Little Maria Mountains. In the general area the hills are formed by outcrops of metamorphosed sediments and granitic rocks, both probably of the Paleozoic age. The sediments include metamorphosed limestones, dolomite, quartzite, schists and gneisses. Material off the hills in the Blythe area is called driftwood, decorative stone or driftstone. It is a float rock, a lime material, part of the old impure limestones bearing siliceous seams, which stand out in relief giving the stones a textured appearance resembling driftwood. The rock is generally stained, the lime portions ranging from silver to buff and the siliceous portions black to dark red from the iron and manganese present. Sometimes the siliceous material is quartz and sometimes it is calcium silicate or wollastonite. Driftstone occurs on all the claims as float rock. It is used as decorative stones in fireplaces, commercial building fronts, house fronts and walls. An outcrop of stone on the Driftstone Veneer Nos. 1 and 2 claims is a slabby dolomite that weathers into a pattern called "elephant hide". It is in thinner slabs than driftwood stone. All the stones were once part of the limestone, dolomite and wollastonite deposits. (Tr. 52).

The record made at the hearing and the appeal have been carefully reviewed. The testimony and evidence adduced at the hearing have been amply summarized by the Hearing Examiner and need not be repeated here in detail.

The Hearing Examiner pointed out that it was undisputed that the dolomite, wollastonite, limestone and other rock found on the claims also occur over a widespread area in the Little Maria Mountains and Big Maria Mountains. He also pointed out that it is undisputed that the driftwood rock which had been removed and marketed from the claims has been used as a decorative building stone in the construction of interior and exterior walls and fireplaces, etc. The Hearing Examiner found that there is no evidence in the record to establish that the deposits of driftwood stone exposed on these claims possess any distinct economic value for use as a building stone over and above the general run of such deposits. He concluded that the driftwood stone is therefore of a "common variety" within the purview of Section 3 of the act of July 23, 1955, supra, not subject to location under the mining laws after the date of the passage of that act.

The Hearing Examiner referred to the contestees' reliance upon the discovery of deposits of dolomite, valuable for use in the chemical industry; wollastonite, valuable for use in the paint, porcelain and other industries; and chemical and metallurgical grade limestone. He properly pointed out that since each of these nonmetalliferous minerals is of widespread occurrence, it is necessary, in order to meet the prudent man test to show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed, and marketed at a profit. The Examiner found concerning the chemical grade limestone exposed on the claims that it has not been shown that the deposits occur in such quantity and such form as to permit economical removal. He found that the wollastonite requires beneficiation at undetermined cost to meet industrial specifications. He also found that the contestees offered no evidence that the wollastonite or dolomite had been chemically analyzed to determine whether those minerals as they occur on the claims are of such chemical composition as to be suitable for industrial use. He found that the contestees have shown only that the markets for dolomite, wollastonite and limestone were being investigated and that it has not been shown that these particular deposits are marketable or that they can be mined, removed and marketed at a profit. He concluded that these deposits on the claims are not valuable mineral deposits within the meaning of the mining laws.

The appellants assert that it takes time to develop a market for building stone and they have had the claims only a short time. The record shows that some of the claims were located in July 1960 and the others in January 1961, and the complaints were served in October 1962. Building stone from the claims was being removed and sold. Since the passage of the act of July 23, 1955, supra, common varieties of stone are no longer locatable. As no right of any kind arises from an invalid claim, and until a mining claim is patented the Government may, at any time, question its validity, Cameron v. United States, 252 U. S. 450, it was proper to challenge the claims through due process, as was done here, which consists of notice and a hearing. If the stone on the claims is a common variety the fact that there may be a ready actual market for such stone will not validate the claims.

In United States v. Kelly Shannon et al., 70 I.D. 136 (1963), the Department held that a crystalline quartz which was attractive in appearance and suitable for use as a decorative facing on buildings and fireplaces and for landscaping purposes was, nevertheless, a common variety.

Thereafter, in another decision the Department observed that in a number of cases decided after July 23, 1955, the contention that special adaptability of minerals for purposes which are recognized as ordinary uses of common varieties of such mineral takes the particular minerals out of the category of common varieties has been considered and rejected. United States v. J. R. Cardwell et al., A-29819 (March 11, 1964).

More recently the Department held that a deposit of stone fractured to a large extent into rectangular shapes and sizes which are suitable for use in construction without further cutting or splitting was not an uncommon variety of building stone as it was not shown to have uses over and above those of deposits of ordinary building stone in the locality. United States v. Kenneth McClarty, A-29821 (August 27, 1964).

In the instant case, the driftwood stone is a decorative building stone. (Tr. 17-18, 68-70). It is clear that the stone is used for the same purposes as other building stones. It is therefore evident that the Hearing Examiner's finding that driftwood stone is a common variety of stone within the purview of Section 3 of the act of July 23, 1955, supra, not subject to location under the mining laws of the United States, is not inconsistent with the departmental rulings and must be affirmed.

Further, the appellants contend that the Hearing Examiner erred in holding that it has not been shown that the limestone, dolomite and wollastonite on the claims could be mined, removed and marketed at a profit for the purposes for which they may be suited, to existing or proposed manufacturing, industrial or processing facilities. It is asserted that this is contrary to the expressions of the Ninth Circuit Court of Appeals in Adams v. United States, 318 F.2d 861, at page 870, quoting therefrom the paragraph citing Castle v. Womble, 19 L.D. 455, and Chrisman v. Miller, 197 U. S. 313, which quotes the prudent man test laid down in the former and recognized by the Supreme Court of the United States in the latter. For emphasis the appellants underscore the sentence: "But value, in the sense of proved ability to mine the deposit at a profit need not be shown."

It must be borne in mind that the Ninth Circuit Court in Adams was concerned with gold, a mineral having intrinsic value. Nevertheless, in the very next paragraph following that which appellants quote, the court said:

> In applying this test evidence as to the cost of extracting the mineral is relevant and evidence of that character was submitted by Adams as well as the Government. The agency properly considered this evidence, not to ascertain whether assured profits were presently demonstrated, but whether, under the circumstances, a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed. The agency did not, in this regard, apply an improper standard.

It is apparent that the appellants seek to validate the claims involved under the proviso of Section 3 of the act of July 23, 1955, supra, by claiming discoveries of wollastonite, dolomite and limestone on the claims.

Departmental regulation 43 CFR 3511.1, which implements Section 3 of the act of July 23, 1955, supra, states:

> (b) "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not "common varieties." This subsection does not relieve a claimant from any requirements of the mining laws.

Where the mineral materials are not "common varieties," the regulation points out, the mining claimant is not relieved from any requirements of the mining laws. Under the mining laws of the United States (30 U.S.C. 1958 ed., secs 21, 22, and 35) only "valuable mineral deposits" may be located and the lands involved must be valuable for minerals. A discovery of a valuable mineral deposit must be made within the limits of each claim. A valid discovery, it has long been held, is one which would warrant a man of ordinary prudence in the further expenditure of his time and money with a reasonable prospect of success in an effort to develop a paying mine. Castle v. Womble, 19 L.D. 455 (1894); Cameron v. United States, 252 U.S. 450 (1920).

With respect to widespread nonmetallic mineral, whether a particular deposit of substance of wide occurrence is a valuable mineral deposit within the contemplation of the mining laws, the rule has been long laid down by the courts and the Department that to justify his possession a mineral claimant must show that by reason of accessibility, bona fides in development, proximity to market, existence of a present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit. Layman v. Ellis, 52 L.D. 714 (1929); Opinion of Acting Solicitor, 54 I.D. 294 (1933); Ickes v. Underwood et al, 141 F.2d 546 (1944); United States v. Strauss et al, 59 I.D. 129 (1945); Foster v. Seaton, 271 F.2d 836 (1959).

The contestees' mining engineer testified that he found deposits of limestone, dolomite and wollastonite on the claims involved. (Tr. 40). They occur as bedded deposits that have upended. (Tr. 56). His estimate of substantial quantities of such materials was from walking the claims or flying over them. (Tr. 63). While analyses were made of 3 samples of limestone, none was made for dolomite and wollastonite. (Tr. 66). There has been no production of wollastonite, dolomite or limestone as such from these claims, except as they occur in the building stone material. (Tr. 68).

The Government's mineral examiner testified that there are outcrops of wollastonite, dolomite and limestone in an admixture throughout the claims. (Tr. 33). Wollastonite is present in little stringers or lenses through portions of the limestone or dolomite and would need to be beneficiated to compete. (Tr. 79). The limestone on the claims was interbedded with lenses of impurities and would have to be selectively mined. (Tr. 80). There has been very little or no development work within the claims for the limestone, dolomite, or wollastonite. (Tr. 83). There has been insufficient development or even sampling within the claim area to justify any conclusions as to whether a commercial or valuable deposit of material has been found.

The record fails to show that any work was done for the purpose of developing the claims for wollastonite, dolomite,or limestone, except as they may occur in the float rock used as a building material. Nowhere in the record is there anything to show that the claims have been tested to determine the depth and quality of the deposits on any of the claims. It is apparent that the contestees are of the belief that the mere mention of the presence of such minerals on the claims and chemical analyses of 3 samples of limestone from or near the surface are sufficient to constitute a discovery of those minerals within each of the claims. The mining claimants have the ultimate burden of establishing by a preponderance of the evidence that their claims are valid. Foster v. Seaton, supra. This they have failed to do and, as a consequence, the findings and conclusions of the Hearing Examiner with respect to limestone, dolomite and wollastonite must be sustained.

Appellants submit with their appeal additional material, which came into being subsequent to the Hearing Examiner's decision. The proceedings in this case were conducted in accordance with the Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. § 1001-1011 (1964). Section 7 of the act, 60 Stat. 241 (1946), 5 U.S.C. 1006 (1964), limits the record for decision to the transcript of the hearing and exhibits, together with papers and requests filed in the proceeding. The Department has construed this to mean that evidence submitted outside the hearing cannot be used as the basis of a decision on the merits of a case but only to determine whether a further hearing should be held at which the evidence can be properly submitted. United States v. Albert Basil Capt et ux., A-27749 (December 17, 1958); United States v. Kenneth O. Watkins et al., A-29862 (April 24, 1964).

Two of the documents are copies of letters both dated June 1, 1964, addressed to Mr. DeZan, one of the contestees, signed by a geologist and associate geologist of the Division of Mines and Geology of the State of California. They are cumulative of the evidence adduced at the hearing.

Also submitted are copies of an "Agreement" dated August 21, 1964, which recites that Gene DeZan and Jean DeZan, his wife, agree to convey to the Western States Stone Company, Inc., eleven certain mining claims. Three of the claims are, the Driftstone Veneer Nos. 1 and 2 and Driftwood No. 2, involved in these proceedings. The fourth item submitted is a "Mining Deed" executed on September 3, 1964, wherein the DeZans quitclaim their right, title, interest and claim in those mining claims named in the agreement to the Western States Stone Company, Inc., subject to certain reservations and exceptions one of which is the exclusive right of the grantors to mine, remove and sell all dolomite and limestone deposits found on the three named claims involved in these proceedings, except for building stone purposes.

The fifth and last document is a copy of a letter dated September 14, 1964, addressed to the appellants' attorney on appeal by C. E. Webster, President of the Western States Stone Company, Inc. He states in pertinent part:

> This will confirm my statement to you while at your office this past week concerning Driftstone Claim #1 and 2 including Driftwood #2. After a personal inspection of the claims it is my belief that there is a vast market that can be developed for the limestone for masonry purposes. We would like to move in shortly with the necessary development work to begin production on a limited basis until we can establish a demand for the stone. There are many factors that must be taken into consideration from a volume stand point when you place a new stone on the market. * * *

The Agreement and quitclaim deed infer nothing as to the quality or quantity of wollastonite, dolomite and limestone deposits in the land. The same is true of Mr. Webster's letter as it relates to building stone, which is not locatable.

It must be concluded that no substantial ground has been presented which would warrant remanding the case for a further hearing.

Accordingly, the Hearing Examiner's decision declaring the Driftstone Veneer Nos. 1 and 2, the Driftwood No. 2, and the Blondie Nos. 1 through 6 placer mining claims null and void is affirmed.

The above-identified appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision the total filing fee will be $45. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

In the event an appeal is taken the adverse party to be served is:

Regional Solicitor
U. S. Department of the Interior
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Los Angeles, California 90013

James F. Doyle
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Enclosures

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Div. of L&M PM (2)
OPD (1)
Gower Federal Service
Appeals List No. 1
WHW

DOCKET FILES

Mining Claims: Lands Subject to 3400.1

Public land in the actual use and possession of the United States, on which the United States has made valuable and permanent improvements, is withdrawn from entry under the mining laws, and a mining claim located on such land after it has become so appropriated is null and void *ab initio*.

Eugene J. Allen, Doris L. Allen, Riverside 05412 (June 22, 1965)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 JUL 6 AM 10 00

In reply refer to:
704
Riverside 05412

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

June 22, 1965

Certified Mail
Return Receipt Requested

DECISION

Eugene J. Allen
Doris L. Allen

: Involving Cliff Quartz Mine
: #1 mining claim insofar as
: it includes lands within the
: S½SW¼ of Lot 14, or S½SW¼NW¼SW¼
: sec. 31, T. 8 N., R. 6 W.,
: S. B. M., California.

Decision Affirmed

Eugene J. Allen and Doris L. Allen have appealed from a decision of the Riverside district and land office, dated July 10, 1964, declaring their Cliff Quartz Mine #1 mining claim, as amended, to be null and void *ab initio*, insofar as it includes lands in the S½SW¼ of Lot 14, or the S½SW¼NW¼SW¼ sec. 31, T. 8 N., R. 6 W., S. B. M., California. The decision noted that the discovery monument of the claim lies approximately 100 feet northerly of the aforementioned five acres and that these lands have been appropriated for public purposes by the Corps of Engineers, United States Army, for use as an aircraft testing site in the Edwards Air Force Base, California, by letter dated May 15, 1964, under Riverside 05051, in accordance with Departmental instructions of January 13, 1916 (44 L.D. 513).

The record shows that the mining claim was originally located on February 10, 1961, as evidenced by the notice of location recorded in Book 434, Page 318, Mining Records, San Bernardino County, California, on that date. This notice of location covers an area 1,500 feet by 600 feet, running 20 feet southwesterly along the course of a vein or lode from the discovery monument and 1,480 feet northeasterly along the course of the vein or lode and extending 300 feet in width on each side of the middle of said vein or lode. An amended notice of location of the Cliff Quartz Mine #1 mining claim, which describes the area in the amended location as extending 750 feet in a southwesterly direction from the discovery monument and 750 feet northeasterly from the discovery monument along the course of the vein, was recorded in Book 448, Page 31, Mining Records, San Bernardino County, on June 15, 1964.

The appellants contend that the boundary lines of the claim as located February 10, 1961, govern the validity of the claim. They assert that the District Engineer, Corps of Engineers, admitted in a letter to them of April 22, 1964, that the Engineers' survey did enter and continue through the mining claim. The appellants further state that the monument posts were in the same location originally as they are now and as they were when the Corps of Engineers entered the mining claim for surveys. The appellants aver that they had to replace monuments that were kicked over as the Corps of Engineers would not replace them, that the Corps of Engineers did not get in touch with them regarding any technicality with regard to the amended location notice, and, finally, that the mining claim location has always been the location of 1,500 feet, 750 feet on each side of the main shaft monument, the correction by the amended location having been made only to make the mining claim valid with the monument posts.

Concerning the establishment of the testing site on the land in issue, the record verifies the fact that written consent to the appropriation of the SW¼ of lot 14 sec. 31, T. 8 N., R. 6 W., S.B.M., to the Corps of Engineers for aircraft testing purposes, was granted by the land office on May 15, 1964, serial number Riverside 05051, under the authority noted.

The record shows further that on May 25, 1964, the appellants offered to lease their mining claim to the Corps of Engineers under certain conditions. Subsequently, in a meeting in the office of the Corps of Engineers, on June 11, 1964, attended by Mr. Allen and certain officials of the Corps of Engineers, Mr. Allen produced a copy of the original location notice of the claim, which indicated that the testing site did not encroach on the mining claim. On June 17, 1964, however, the Corps of Engineers received a letter from Mr. Allen and a copy of the amended notice, which had been recorded on June 15, 1964. The description of the claim as contained in the amended location notice encompasses the larger part of the testing site in question and a portion of the access road to the site. On June 18, 1964, members of the Corps of Engineers' survey crew made an examination on the ground to determine whether or not the appellants had established new monuments to conform to the amended location notice. It was found that the appellants had in fact placed new location notices, to conform to the amended description of the amended location notice recorded on June 15, 1964, in glass mason jars in existing rock cairns located approximately 640 feet and 810 feet from the open mine shaft of Cliff Quartz Mine #1 mining claim, respectively, the amended location encompassing the majority of the site, as previously stated. The appellants, however, did not set any new monuments approximately 750 feet in a northeasterly direction from the discovery monument.

It is clear that the amended location of the Cliff Quartz Mine #1 mining claim includes land which was not embraced in the original claim located on February 10, 1961. In this respect the amendment constitutes a relocation or a new location. See Everett M. Baumkirchner et al., A-29812 (February 12, 1964).

Public land in the actual use and possession of the United States, on which the United States has made valuable and permanent improvements, are withdrawn from entry under the mining laws. United States v. Schaub, 207 F.2d 325 (9th Cir. 1953).

Accordingly, that portion of the Cliff Quartz Mine #1 mining claim, which, by the amended location made on June 15, 1964, invades the land in issue, is null and void ab initio, for the reason that this land was not subject to entry under the mining laws at that time. Cf. Mrs. Ethel H. Meyers, 65 I.D. 207 (1958).

The decision appealed from is affirmed.

Eugene J. Allen and Doris L. Allen are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken, the appellants will have the burden of proving by presenting positive and substantial evidence wherein the decision is in error.

If an appeal is taken, the adverse party to be served is:

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Frances A. Patton

Chief, Branch of Mineral Appeals
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Enclosures

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Conservation Division, Geological Survey (3)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
RBO

appeal to Sec.
affirmed as Modified A-30537
8-30-68

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1965 AUG 5 AM 10 00

Mining Claims: Discovery 3413

The requirement in connection with discovery that a deposit of widespread nonmetallic material be marketable in order to be valuable within the contemplation of the mining laws, was laid down by the Courts and Department long before the enactment of the act of July 23, 1955-- in fact, laid down before the attempted location of the mining claim in issue in 1948.

A geological inference has never been accepted as a substitute for the discovery of a valuable mineral deposit within the boundaries of a mining claim.

Mining Claims: Determination of Validity 3400.1

Once the Government has established *prima facie* that a mining claim is invalid, the duty then falls upon the claimant to show by a preponderance of the evidence that the claim is valid.

Where a mining claim was located in 1948, but there has been no significant development work done on the claim in the ensuing years, the fact that the claim was not developed is at least an indication that the mining claimant did not believe that there was a present demand for the deposits on the claim.

Mining Claims: Mill Sites 3417

A mill site, proposed for use in connection with a placer mining claim determined to be invalid for lack of discovery, cannot be patented within the purview of the act permitting the patenting of mill sites in connection with the patenting of a placer mining claim (30 U.S.C. § 42 (b) (1964)).

United States v. *Harold Ladd Pierce*, Los Angeles Contest No. 0170645 (Riverside) (July 27, 1965)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Los Angeles Contest
No. 0170645
Los Angeles 0170645
(now Riverside)

July 27, 1965

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America,
Contestant,

v.

Harold Ladd Pierce,
Contestee-Appellant.

P-1 Pierce Placer Mining Claim located in sec. 22, and Mill Site A located in sec. 24, T. 3 S., R. 3 E. S.B.M., California.

Decision Affirmed

Mr. Harold Ladd Pierce has appealed from the Hearing Examiner's decision, dated April 29, 1964, declaring null and void the above-identified mining claim, as amended, for the reason that it lacks a discovery of a valuable mineral deposit within the purview of the mining laws, declaring invalid the mill site, as amended, for the reason that no present occupation or use has been shown such as would satisfy the requirements of the act of March 18, 1960 (30 U.S.C. § 42(b) (1964)), and rejecting mineral patent application Los Angeles 0170645 for such claims.

After an investigation in response to Mr. Pierce's filing the mineral patent application, a contest complaint was issued charging, in pertinent part, that:

a. Mineral materials have not been found within the limits of the P-1 Pierce Placer Mining Claim in sufficient quantities to constitute a valid discovery.

b. No discovery has been made within the limits of the P-1 Pierce Placer Mining Claim because the mineral materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for these materials.

c. The Mill Site A Claim has not been used or occupied for the purpose of mining, milling, beneficiation or other operation in connection with the P-1 Pierce Placer Mining Claim.

Mr. Pierce filed an answer to the contest complaint denying each of these allegations and alleging, in substance, that there are five million tons of limestone and aplite on the mining claim suitable for the manufacture of enumerated types of cement, that he is negotiating to sell the limestone, and that the crushing and screening of the limestone will cause by-products which can be sold at a profit for use in sparkling roof rock and chick feed. The answer further alleged that the mill site has been used to crush, screen, and classify limestone in connection with the operation of the P-1 Pierce placer mining claim.

A hearing was held on September 18 and 19, 1963, before the Hearing Examiner. The Government was represented by the Department's Office of the Regional Solicitor at Los Angeles, California. Mr. Pierce appeared personally and was represented by counsel. Each party offered testimony and submitted other pertinent evidence.

The entire record made at the hearing has been carefully reviewed. The testimony and evidence adduced at the hearing is amply summarized by the Hearing Examiner and need only be referred to in this decision as pertinent to issues raised on appeal.

Mr. Pierce, in his appeal, contends that whether the limestone deposits on the mining claim were marketable on or prior to the enactment of the act of July 23, 1955 (30 U.S.C. § 611 (1964)), is not an issue in this case.

The Hearing Examiner's decision points out that there is no evidence in the record that the deposits of limestone and aplite on the claim were marketable prior to the act of 1955, supra. The placer claim was located by the contestee, as agent for a group of locators, on March 10, 1948. The rights of the co-locators were assigned to Mr. Pierce on May 13, 1948.

With respect to widespread nonmetallic material, whether a particular deposit is a valuable mineral deposit within the contemplation of the mining laws, the rule has long been laid down by the Courts and the Department that to justify possession a mineral claimant must show that by reason of accessibility, bona fides in development, proximity to market, existence of a present demand, and other factors, the deposit is of such value that it can be mined, removed, and disposed of at a profit. See Layman v. Ellis, 52 L.D. 714 (1929); Opinion of the Acting Solicitor, 54 I.D. 294 (1933); Ickes v. Underwood et al., 141 F. 2d 546 (1944); and United States v. Strauss et al., 59 I.D. 129, 138 (1945). Note that all of these decisions were rendered prior to the alleged location of the mining claim in 1948. 1/ Clearly, in order for the claimed discovery of a valuable deposit of limestone in 1948 to have been a valuable discovery within the purview of the mining laws, there must have been a present

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1/ It is to be noted that United States v. Strauss et al., supra, also invol
limestone deposits.

market for the material at the time of the attempted location. Marketability of the material on the mining claim at the time of the attempted location, at the time of the enactment of the act of July 23, 1955, supra, [2] at the time of the filing of the mineral patent application, at the time of the hearing, and at intervening times, are all issues in this contest.

Next, on appeal, Mr. Pierce in substance argues that the burden was on the contestant to show that a market did not exist for the material. Once the United States has established prima facie that a claim is invalid, the duty then falls upon the mining claimant to show by a preponderance of the evidence that his claim is valid. See United States v. Robert Hight et al., A-30256 (April 21, 1965) and the cases cited therein.

At the hearing, the United States offered the testimony of two experienced mining valuation engineers, who, in their capacity as employees of the Bureau of Land Management, had examined the mining claim and mill site. These witnesses testified that, although there are areas of limestone on the claim that could be used for chemically pure limestone (1st Tr. 55), felsic rocks intrude into the limestone in mass so that surface methods of extraction will not maintain any purity of the limestone (1st Tr. 12). One mining engineer testified that he was of the opinion that the limestone could not be extracted at a profit even if someone would purchase the material (1st Tr. 90). The witness explained that a road must be constructed on the claim, and that there is an engineering problem extracting the limestone because of the topography and geology of the claim (1st Tr. 90-91). The mining engineer was of the opinion that valuable minerals have not been found in sufficient quantity on the claim, the materials present cannot be marketed at a profit, and there is no market for such material (1st Tr. 96-97). Such evidence, together with the assay reports from samples of material removed from the claim, establishes prima facie that the material is not valuable within the purview of the mining laws and that it cannot be marketed profitably.

Mr. Pierce has sought a mineral patent for the mining claim and mill site, and a patent cannot be issued until it is shown that compliance has been made with the requirements of the pertinent mining laws and regulations. When a mineral locator has made a discovery, exploits it fully, and has been protected by the mining laws in his possession of the mining claim, the purpose of the mining laws has been fulfilled. A mineral claimant can obtain patent only when the conditions on his claim satisfy the requirements of the mining laws. When Mr. Pierce applied for patent he voluntarily assumed the burden of showing that a valid discovery had been made. See United States v. Eric North, A-27936 (July 1, 1959).

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[2] The act of 1955 provides, in pertinent part, that no deposit of common varieties of stone shall be deemed a valuable deposit within the meaning of the mining laws so as to give effective validity to any mining claim located after the effective date of that act. See 43 CFR 3511.1(b) of the departmental regulations for an explanation of "common varieties" within the purview of that act.

The mineral patent applicant requests, in substance, that the contest be remanded and the hearing reopened in order that he may submit a further showing as to marketability, especially that mineral from the claim could have been marketed and marketed competitively in past years. Mr. Pierce has not stated what further showing he could make, nor has he shown that he was unable to present such evidence at the original hearing. The quoted charge contained in the contest complaint (especially the charge designated "b") placed marketability in issue, but Mr. Pierce's evidence was restricted to possible future plans, all based on contingencies, to market the mineral. Since there is no showing that a further hearing would be productive of evidence that a valid discovery had been made and retained, the appellant's request is denied. Cf. United States v. C. F. Snyder et al., 72 I.D. 223, 232 (1965).

The evidence adduced at the hearing shows that roads have not been constructed preparatory to removal of the mineral deposits and there has been little development work on the mining claim. The appellant relies on limestone shown in cores from drill holes on adjoining patented land to support his assertion that there are sufficient quantities of marketable limestone under the surface on the mining claim in issue, but such evidence is merely conjectural because no core drilling has been done on the mining claim in issue, so there is no showing to support a finding that the limestone deposit on the claim underneath the surface is of valuable quantity and quality. Assuming there may be a geological inference arising by a comparison of the material found in the cores from the drill holes on the adjoining limestone property with the surface material found on the mining claim in issue, a geological inference has never been accepted as a substitute for the discovery of a valuable mineral deposit within the boundaries of a mining claim. See United States v. Melvin L. Nevitt, A-30030 (July 28, 1964), and the cases cited therein.

As stated, the claim was located in 1948, but there has been no significant development work done on the claim in all of the ensuing years. The fact that the claim was not developed is at least some indication that Mr. Pierce did not believe that there was a present demand for the deposits on the claim. See United States v. Fisher Contracting Company et al., A-28779 (August 21, 1962).

We are of the opinion that the evidence adduced at the hearing supports the findings of the Hearing Examiner. The testimony of the Bureau's two mineral examiners established a *prima facie* case of lack of discovery of a valuable mineral deposit on the P-1 Pierce placer mining claim. At that time the burden of proof shifted to Mr. Pierce to show by a preponderance of the evidence that a discovery had been made, which means that if the contestee had met the evidence produced by the Government with evidence of equal weight only, he would not be entitled to receive a mineral patent. See United States v. Clyde Raymond Altman et al., 68 I.D. 235 (1961).

In his appeal, Mr. Pierce objects to various quoted statements contained in the decision appealed from, and objects to the Hearing Examiner's conclusion. The statements and conclusion are supported by the testimony offered by the Government at the hearing. Mr. Pierce has not shown in his appeal wherein the statements and conclusion are erroneous.

Since the undisputed evidence is that the purported mill site was used or was to be used in connection with the mining claim in issue, the mill site must fall because it has been shown that the mining claim is invalid. The pertinent part of the act permitting the patenting of mill sites in connection with placer mining claims (30 U.S.C. § 42(b) (1964)) reads:

> (b) Where nonmineral land is needed by the proprietor of a placer claim for mining, milling, processing, beneficiation, or other operations in connection with such claim, and is used or occupied by the proprietor for such purposes, such land may be included in an application for a patent for such claim * * *.

Since only prospecting activities have been carried on in connection with the mining claim, the claimed mill site has not been used as provided in the quoted statute. Therefore, the patent application for the mill site cannot be allowed.

For the reasons stated, the decision of the Hearing Examiner determining the P-1 Pierce placer mining claim and Mill Site A null and void, and rejecting the mineral patent application for the lands embraced in such claims, is affirmed.

Mr. Harold Ladd Pierce is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each of the mining claim and the mill site if both are included in the appeal, or a total of $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the mining claimant will have the burden of showing wherein the decision appealed from is in error.

If an appeal is taken, the attorney for the contestant who must be served is:

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458 South Spring Street
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James F. Doyle
Chief, Office of Appeals and Hearings

Enclosures 2

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Administrative Assistant, Hearings
OPD (1)
Gower Federal Service
Appeals List No. 1
JHO'D

appeal to Sec
affirmed A-30524
8-30-68

Mining Claims: Discovery 3413

With respect to widespread nonmetallic material, whether a particular deposit is a valuable mineral deposit within the contemplation of the mining laws, the rule long laid down by the Courts and the Department requires that to justify his possession a mineral claimant must show that by reason of accessibility, bona fides in development, proximity to market, existence of a present demand, and other factors, the deposit is of such value that it can be mined, removed, and disposed of at a profit.

The fact that, except for a few samples, no material has been removed from mining claims for nonmetallic materials is some indication that the claimant did not believe there was a demand for the deposits on the claims where some of the claims were located as early as 1948.

Mining Claims: Determination of Validity 3400.1

After the contestant establishes a prima facie case, the burden shifts to the mining claimant to prove a valid discovery by a preponderance of the evidence.

Mining Claims: Mill Sites 3417

Where a Hearing Examiner determines a mill site invalid, the appellant has the burden on appeal to point out wherein that part of the decision appealed from relating to the mill site is in error.

United States v. Harold Ladd Pierce, Los Angeles Contest No. 0171256 (Riverside) (September 20, 1965)

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SACRAMENTO LAND OFFICE
1965 OCT 1 PM 2 55

In reply refer to:
704
Los Angeles Contest
No. 0171256
(Riverside)

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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

September 20, 1965

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DECISION

United States of America, Contestant
v.
Harold Ladd Pierce, Appellant-Contestee

P-6L-Pierce Group and Z8L-Zemula-Pierce Group lode mining claims, Jamie placer mining claim, and Pierce-PMS-No. 1 Mill Site located in sec. 24, T. 3 S., R. 3 E., S. B. Mer., California

Decision Affirmed

Mr. Harold Ladd Pierce has appealed from the Hearing Examiner's decision, dated January 27, 1965, determining that each of the above-identified mining claims is invalid because of a lack of discovery of a valuable mineral deposit within the purview of the mining laws on such claims, and determining the named mill site invalid for the reason that it has not been used in connection with any mining operation.

As a result of information obtained during the processing of a protest filed by Mr. Pierce against mineral patent application Los Angeles 0156147 filed by Louis G. Steck for adjoining lands, an investigation was initiated and a contest complaint issued against the above-identified lode mining claims[1] and the mill site. Mr. Pierce filed an answer to the complaint. A hearing was held on December 11 and 12, 1963, and June 16, 1964, before the Hearing Examiner. The Government was represented by the Department's Office of the Regional Solicitor at Los Angeles, California. Mr. Pierce appeared personally and was represented by counsel. Each party offered testimony and submitted other pertinent evidence.

The record made at the hearing has been carefully reviewed. The testimony and evidence adduced at the hearing are amply summarized in the decision appealed from and need only be referred to now as pertinent to issues raised on this appeal.

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[1] By stipulation the contest complaint was amended to include the Jamie placer claim also.

The original contest complaint charged that the land embraced within the lode mining claims is nonmineral in character, and that minerals have not been found within the claims in sufficient quantities to constitute a valid discovery. The complaint also charged that the mill site is not being used or occupied for mining, milling, processing or beneficiation purposes as required by the act of May 10, 1872 as amended by the act of March 18, 1960 (30 U.S.C. § 42(a) and (b) (1964)). The complaint was amended to include the placer mining claim, and also to charge that minerals found on the latter claim are of a common variety within the meaning of the act of July 23, 1955 (30 U.S.C. § 611 (1964)).

The two lode mining claims were originally located on May 7, 1948, and the locations were amended on November 7, 1958 (Exhs. 1 and 2). The placer claim was located on June 28, 1963 (Exh. 5), which is after the effective date of the act of July 23, 1955, supra, providing, in pertinent part, that deposits of common varieties of sand, stone, and gravel are no longer deemed valuable mineral deposits within the meaning of the mining laws and so are not locatable under such laws. The mill site was relocated on June 28, 1960 (Exhs. 3 and 4).

Two mining engineers, appearing on behalf of the Government, testified that they had examined each of the mining claims and the mill site, and that each witness is of the opinion that the materials found on the claims cannot be extracted, transported to market, and sold at a profit. The bases for the experts' opinions are detailed in the Hearing Examiner's decision. Such testimony established a prima facie case of lack of discovery of a valuable mineral deposit on each claim in issue. Mr. Pierce then had the burden of showing by a preponderance of the evidence, not merely evidence of equal weight, that a discovery had been made on each mining claim. Cf. United States v. Clyde Raymond Altman et al., 68 I.D. 235 (1961).

The mining claimant testified as to the marketability of materials removed from other claims not in issue. A witness for Mr. Pierce testified that he was in the machinery, manufacturing, and engineering business, and that he had prepared a cost study (Exh. V) to utilize the lode material, marketing it as a pulverized rock without separation of the mica from the mica schist, and no separation of the feldspar other than by selective mining. The testimony is amply summarized in the decision appealed from. Such testimony speculates as to the worth of the materials on the mining claims, but in the absence of more discovery work does not refute the testimony of the Government mining engineers and is not of sufficient weight to warrant changing the finding of the Hearing Examiner that there has been no discovery made on any of the mining claims.

In his appeal, Mr. Pierce asserts, in substance, that the evidence adduced at the hearings shows that deposits of mica schist, limestone, feldspar, and aplite found on the mining claims can be sold profitably now and prior to the

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enactment of the act of 1955, supra. The lode claims were located in 1948, nevertheless, there has been no significant development work done on any of the mining claims in issue. The fact that, except for a few samples, no material has been removed from the claims is certainly some indication that Mr. Pierce did not believe that there was a demand for the deposits on the claims during those many years. See United States v. Fisher Contracting Company et al., A-28779 (August 21, 1962). The Bureau mining engineers who examined the claims found no discovery work has been done on the placer claim.

The appellant refers in his appeal to the aforementioned testimony showing that mica schist has been removed and sold from land not in issue, and that there is a market for limestone and feldspar in the Los Angeles area. With respect to widespread nonmetallic material, whether a particular deposit is a valuable mineral deposit within the contemplation of the mining laws, the rule long been laid down by the Courts and the Department requires that to justify his possession a mineral claimant must show that by reason of accessibility, bona fides in development, proximity to market, existence of a present demand, and other factors, the deposit is of such value that it can be mined, removed, and disposed of at a profit. See Layman et al.,vs.Ellis, 52 L.D. 714 (1929); Opinion of the Acting Solicitor, 54 I.D. 294 (1933); Ickes v. Underwood et al., 141 F. 2d 546 (1944); and United States v. Strauss et al., 59 I.D. 129, 138 (1945). The evidence relied upon by the appellant showing that material from land in the same general area has been sold does not show that the particular deposits of materials on the mining claims in issue are accessible to that market, or that there has been bona fides in development on such claims, or even that the materials on such mining claims are also in demand in the market. The evidence referred to by the appellant does not warrant changing the decision appealed from, since such evidence by itself is not sufficient to justify the claim of the appellant to possession. The mining claims were properly determined to be null and void.

In his appeal, Mr. Pierce asserts that the Hearing Examiner erred in finding that some of the minerals found within the limits of the mining claims are common varieties within the purview of the act of July 23, 1955, supra. See 43 CFR 3511.1(b) of the regulations for a departmental clarification of what constitutes "common varieties" within the purview of the latter act. In the absence of a showing that a valuable deposit within the purview of the general mining laws has been discovered within the boundaries of the mining claims there is no purpose in making a determination concerning the "common varieties" issues sought to be raised by the appeal.

Lastly, Mr. Pierce states a ruling should have been made by the Examiner as to the mineral or nonmineral character of the lands in issue. The contest was initiated for the purpose of determining the validity of the claims, and since the evidence did not show a valid discovery on any of the claims, requiring a finding that the claims are invalid, it is not necessary that the Examiner rule on the charge concerning the character of the lands.

Although the appellant paid sufficient appeal filing fee for a consideration of the three mining claims and the mill site adversely affected by the Hearing Examiner's decision, he has not shown in his appeal wherein that part of the decision appealed from relating to the mill site is in error. An appeal is subject to dismissal when the appellant fails to point out any error in the decision appealed from. Cf. Rudolph Kamon, A-30309 (November 5, 1964).

Accordingly, the decision of the Hearing Examiner determining the mining claims and mill site each null and void is affirmed.

Mr. Harold Ladd Pierce is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim and for the mill site included in the appeal. If all of the mining claims and the mill site adversely affected by this decision are included, the total filing fee will be $20. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of showing wherein the decision appealed from is in error.

If an appeal is taken, the attorney for the contestant who must be served is:

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Administrative Assistant, Appeals and Hearings
Gower Federal Service
Appeals List No. 1
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Mining Claims: Hearings 3482.2

Where, with diligence, a mining claimant could have requested a postponement of a hearing and he fails to appear at the hearing, he must bear the consequences of his own inaction; moreover, a request for a further hearing will be denied where the request is based upon evidence which was in existence prior to the hearing.

United States v. Will R. Braden et al., Contest No. 0170977 (Los Angeles)
(November 1, 1965)

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In reply refer to:
704
Contest No. 0170977
(Los Angeles)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

November 1, 1965

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DECISION

United States,
Contestant

v.

Will R. Braden
Margaret A. Braden,
Contestees

Black Crow lode mining claim and La Solana mill site, situated in unsurveyed Secs. 13, 14, 23, and 24, T. 3 N., R. 12 W., S.B.M., Los Angeles County, California, within the Angeles National Forest.

Decision Affirmed

Mr. and Mrs. Will R. Braden have appealed from a decision of a Chief Hearing Examiner, dated April 9, 1964, declaring null and void the Black Crow lode mining claim and the La Solana mill site and rejecting the mineral patent application Los Angeles 0170977 for the claim and mill site. The basis for invalidation was the lack of discovery of a valuable mineral deposit on the mining claim within the purview of the mining law and the fact that the mill site is not being used for the purposes contemplated by the mill site law.

The Bradens were served with a copy of the contest complaint of March 26, 1963, through the office of their designated attorney at law, as noted in their mineral patent application. The complaint charged that (a) no discovery of a valuable mineral deposit exists within the limits of the Black Crow lode mining claim, and (b) the La Solana mill site is not used or occupied for mining or milling purposes.

The contestees' attorney filed a timely answer to the complaint denying generally the charges contained therein. A notice of hearing, dated October 9, 1963, addressed to the attorney directed the parties to the contest to appear at a hearing on December 4, 1963, in Los Angeles, California. At the request of contestees' attorney the hearing was rescheduled for February 25, 1964, pursuant to a notice of hearing, dated January 10, 1964. On February 12, 1964, the contestees and their attorney of record executed a document styled a "Substitution of Attorneys," wherein the contestees substituted themselves in place of their attorney of record. This document was transmitted by the attorney's letter of February 20, 1964, and was received in the Office of the Hearing Examiners at Sacramento, California, on February 24, 1964.

Pursuant to the aforementioned notice, the hearing was held on February 25, 1964. A member of the staff of the Regional Attorney, Office of the General Counsel, U. S. Department of Agriculture, appeared on behalf of the Government. The contestees did not appear at the hearing and no one appeared or offered evidence in their behalf. The sole witness at the hearing was a mining engineer employed by the Forest Service.

The Hearing Examiner found from the evidence presented that there was currently no known method or technique of processing the minerals on the claim into a salable and usable product. He further found under the prudent man rule of discovery that the deposit on the claim is not a valuable mineral deposit within the purview of the mining laws. The Examiner also found that the mill site is not being used for the purposes contemplated by the mill site law.

The testimony and evidence offered by the Government reveal that the Black Crow lode mining claim and the La Solana mill site are adjacent to each other. They were examined by Forest Service mining engineers in December 1962 and October 1963. The first examination was in the presence of Mr. Braden, one of the contestees. The claim and mill site are situated in the San Gabriel Mountains through which there is a broad zone of titaniferous magnetite occurring within the anorthosite country rock as segregated pods. The witness found a pod of titaniferous magnetite on the Black Crow measuring 90 feet in length, 25 feet in width, and exposed in the discovery cut to a depth of 10 feet. There is no evidence that the claim has been drilled to determine the depth of the deposit. A grab sample across the face of the cut and a random grab sample of material from the dump adjacent to the cut were combined and sent for assay. The witness also testified that the sample and method by which it was taken was agreeable to Mr. Braden. The assay report (Exh. 9) shows 26.85% iron and 0.11% titanium oxide. The witness stated it indicated that the deposit on the claim is no better or no worse than numerous other deposits within the San Gabriel Mountains. The San Gabriel magnetite and ilmenite are finely interlaced and the deposits cannot be utilized until an economical metallurgical technique to separate the iron from the titanium has been developed. The bulk of the titanium industry is in the East where a practical metallurgical method has been achieved to separate the types of deposits found there. The Government's witness was of the opinion that considering the small size of the deposit on the claim, the absence of a suitable process of separation and other economic factors a prudent man would not be justified in spending time and money in an effort to develop a paying mine (Tr. 25).

The testimony in regard to the mill site was that it contained a small cabin, the shell of a larger cabin and a small powerhouse, that the mill site is not being used for mining and milling purposes and that there was nothing thereon which could be used for such purposes (Tr. 4, 25 and 26).

After careful review of the record made at the hearing, it is concluded that the Government presented a prima facie case and that the record supports the findings and conclusions of the Chief Hearing Examiner.

On appeal the contestees allege that they had intended to be present at the hearing held on February 25, 1964, but the sickness and death of Mrs. Braden's mother on February 11, 1964, and related expenses took all of their available funds. It is also alleged that Mrs. Braden suffered an illness brought on by the emotional stress of the death of her mother. It is further alleged that Will R. Braden in the excitement had very severe asthma attacks requiring supplements of oxygen in order to breathe. It is also asserted that in their illnesses the day of the hearing had passed without their realizing it.

Primarily, the appellants' appeal is a request for a new hearing and their offer of evidence with their appeal is presumed to be essentially for that purpose.

In the reasons for appeal it is stated that the samples taken in the presence of Mr. Braden were not representative samples, and it is claimed on appeal that Mr. Braden protested the manner of taking samples. The appellants assert that their samples taken over the years show higher percentages of iron and titanium oxide, relying on their appeal Exhibits A, B, and B-1.

Another reason for their request for a new hearing is that they claim there is a feasible method of smelting titaniferous magnetite for extracting both the iron and titanium, called the Strategic-Udy Process. They refer to appeal Exhibits D and E.

A mining claimant can obtain a patent only when the conditions on his claim satisfy the requirements of the mining laws. The appellants' possessory right might have continued in the absence of any request for patent, but when they applied for a patent they voluntarily assumed the burden of showing a valid discovery presently exists on the claim. United States v. Eric North, A-27936 (July 1, 1959).

The purpose of a hearing in a Government contest against mining claims and mill sites is to afford both parties full opportunity to be heard and to present evidence. If a claimant chooses not to appear at a hearing to submit evidence or to subject the Government witnesses to cross-examination, he must bear the consequences of his inaction. United States v. Al Sarena Mines, Inc., 61 I. D. 280, 286 (1954). It is proper in such circumstances for a Hearing Examiner to proceed with a scheduled hearing and to base his decision on the uncontroverted evidence submitted. United States v. John Olson et al., A-29953, etc. (April 13, 1964).

The appellants' failure to appear at the hearing was the result of their own inaction which they claim was due to the circumstances hereinbefore mentioned. The record shows, however, that the claimants executed the document for substitution of attorneys on February 12, 1964, the day following the death of

Mrs. Braden's mother. It would appear that in the exercise of reasonable diligence they should have requested a postponement of the scheduled hearing under the provisions of regulation 43 CFR 1852.3-3. Further, they could have requested relief from payment of the reporter's fee under 43 CFR 1852.3-7(3), if they were financially unable to pay. It must be found, therefore, that the appellants' failure to act or to appear at the hearing for the protection of their interests was due to their own lack of diligence, and they must bear the consequences.

Concerning the exhibits submitted with the appellants' appeal and the request of the appellants for a new hearing, it has been held that evidence submitted outside of the hearing cannot be used as the basis for decision on the merits of a case but only to determine whether a further hearing should be held at which the evidence can be properly submitted. United States v. Ed. and Leona Jaensch, A-30225 (April 29, 1965), footnote 1.

Exhibit A submitted with the appeal is a copy of Black Crow Mine stationery, unsigned and undated, containing a compilation of assays for iron and titanium oxide allegedly made by the named corporations and assayers. While the letterhead is that of the Black Crow Mine and the heading over the listing states they are assays from the Black Crow Mine, there is nothing else which associates the results indicated with samples from the Black Crow, the lode claim here involved or which states when the samples were taken. In fact, one item is stated to be related to a sample of float on Ryan #12, a claim not involved in this contest. The exhibit is lacking in many essentials necessary to make it acceptable as such, including the dates on which the assays were made. The statement of reasons indicates that the assays were "taken over the years." The inference is that they were made prior to the hearing. Therefore, they should have been offered in evidence at the hearing held.

Exhibits B and B-1 are copies of spectrographic analyses made by the Allied Research Laboratories, dated July 23, 1942, and Reed Engineering, dated June 21, 1963, respectively. These documents were in existence on February 25, 1964, the date of the hearing. With reasonable diligence they could have been offered in evidence at that time. The same is true for Exhibits D and E. Exhibit D is a copy of a letter dated February 25, 1963, addressed to Mr. Braden by the Strategic-Udy Processes, Inc., Niagara Falls, New York, transmitting a reprint (Exhibit E) of an article from the Mining Congress Journal of October 1962, entitled "Smelting of Titaniferous Iron Ores of Wyoming," and written by Murray C. Udy. The contestees contend that the article establishes that there is a known method of separation of the titaniferous magnetite from their claim, yet the second paragraph of the letter from Strategic-Udy reads:

> Strategic-Udy is in a position to make concentration studies and to make smelting demonstrations. We would be pleased to quote on any work of this sort you would like to have done.

The feasibility of separation of the material from the contested claim is not a proven fact. It can only be determined by future studies and demonstrations.

None of the material submitted on appeal is newly discovered since the hearing held on February 25, 1964. It is concluded that no substantial ground has been presented which would warrant remanding the case for a further hearing.

Accordingly, the decision appealed from declaring null and void the Black Crow lode mining claim and the La Solana mill site and rejecting patent application Los Angeles 0170977 for them, is affirmed.

Mr. and Mrs. Braden are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim and mill site included in the appeal. If the appeal covers the mining claim and mill site adversely affected by this decision the total filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

In the event an appeal is taken the adverse party to be served is:

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San Francisco, California 94111

James F. Doyle
Chief, Office of Appeals
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Forest Service, Div. of Recreation, USDA (8)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Chief Hearing Examiner Graydon E. Holt (Sacramento)
Administrative Assistant, Hearings
Gower Federal Service
Appeals List No. 1
WHW

Mining Claims: Contests (Hearings Procedures) 1852.1-7(a)

Mining claims are properly declared null and void where the contestee fails to file an answer denying the charges of invalidity contained in the contest complaint served upon him.

United States of America v. Frank R. Jackson, Contest No. Sacramento 067414 (December 22, 1965)

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704
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067414

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

December 22, 1965

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DECISION

United States of America
Contestant

v.

Frank R. Jackson
Contestee-Appellant

Mineral Patent Application
Lost Nugget Nos. 1 to 8,
inclusive, placer mining
claims, located in secs.
8 & 9, T. 39 N., R. 9 W.,
M.D.M., California, within
the Klamath National Forest

Decision Affirmed

Mr. Frank R. Jackson has appealed from a decision of the Sacramento, California land office, dated April 29, 1964, which declared the subject claims null and void and rejected the patent application for failure of the contestee to file an answer to a complaint charging lack of discovery of valuable minerals on the claims. The complaint had been directed against the claims and the mineral patent application by the Forest Service of the United States Department of Agriculture.

The last paragraph of the complaint contained a notice to the effect that if an answer was not filed within 30 days of service, the allegations would be taken as admitted and the case would be decided without a hearing. This was pursuant to authority contained in 43 CFR 1852.1-6 and 1852.1-7(a), formerly 43 CFR 221.64 and 221.65.

In the notice of appeal signed by appellant's attorney the reasons given for failure to file an answer were that it "was caused in part by the illness of the contestee and in part by the pressure of legal affairs in the office of the attorney for the contestee." The notice also stated that a fuller statement would be filed. 1/

The reasons given are insufficient to waive the requirements of the above-cited rules. The Department has held that the language of these rules is mandatory. There has been a long line of Departmental rulings that, where a contestee fails to answer timely, the allegations of the complaint will be taken as admitted and a decision will be rendered against him. United States v. J. Hubert Smith, 67 I.D. 311 (1960); United States v. Raymer Garnett, et al., A-28545 (January 31, 1961); United States v. Henry Gilligan, et al.,

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1/ No additional statement has been filed.

A-28857 (February 19, 1962); United States v. Bradley-Turner Mines, Inc., A-29813 (November 19, 1963).

The decision is correct, and it is affirmed.

Mr. Frank R. Jackson is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form Wo 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all claims adversely affected by this decision the total filing fee is $40. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decisi appealed from is in error.

If an appeal is taken the adverse party to be served is:

Regional Forester
Forest Service, California Region
U. S. Department of Agriculture
630 Sansome Street
San Francisco, California

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures

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Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
PLS

Potassium Leases and Permits: Permits 3540

GFS (MIN) 5 (1986)

Lands withdrawn from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, are not available for potassium prospecting permit, therefore, a prospecting permit application for such lands is properly rejected.

John D. Archer, Riverside 05755 (January 15, 1986)

A-28257 (February 15, 1961); United States v. [illegible]-Dunham Mines, Inc., A-29011 (November 19, 1962).

The decision is correct, and it is affirmed.

Mr. Frank E. Jackson is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form 4-1364-1 and Circular 2157. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all claims adversely affected by this decision the total filing fee is $40. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of showing, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

If an appeal is taken the adverse party to be served is:

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U. S. Department of Agriculture
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Appeals List No. 3
TAB

DOCKET FILES

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1966 JAN 31 AM 10 00

③

Potassium Leases and Permits: Permits 3142

Lands withdrawn from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, are not available for potassium prospecting permit, therefore, a potassium permit application for such lands is properly rejected.

John B. Ashmun, Riverside 05705 (January 11, 1966)

In reply refer to:
704
Riverside 05705

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

January 11, 1966

Certified Mail
Return Receipt Requested

DECISION

John B. Ashmun : Potassium

Decision Affirmed

Mr. John B. Ashmun has appealed from the October 19, 1964 decision of the Riverside district and land office which rejected his above-identified potassium prospecting permit application for certain lands in T. 10 S., R. 12 E., S.B. Mer., California. The decision held that the lands were withdrawn from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and reserved for the use of the United States Atomic Energy Commission, pursuant to Public Land Order 649 of June 12, 1950 (15 F.R. 3936). The decision stated that an application for restoration of the withdrawn lands was filed by the Commission on March 1, 1963, however, final action had not been completed thereon at the time the above-noted potassium application was filed.

The appellant does not dispute the status of the lands, as reported by the land office, but he inquires as to whether his application may be considered at such time as the restoration becomes effective.

Lands withdrawn from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, are not available for inclusion in prospecting permits under the act of February 7, 1927, as amended (30 U.S.C. secs. 281-287), and an application for such lands is properly rejected. Cf. Frank M. McGinley, 67 I.D. 194 (1960). Such an application may not be suspended pending the availability of the lands for permit and leasing. Cf. J. G. Hatheway et al., 68 I.D. 48 (1961).

The decision appealed from is affirmed.

Mr. John B. Ashmun is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving by presenting positive and substantial evidence wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

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Geological Survey, Conservation Division (3)
Gower Federal Service
Appeals List No. 1
AHO

DOCKET FILES

Mining Claims: Determination of Validity 3400.1

The Department has never accepted a geological inference as a substitute for the discovery of a valuable mineral deposit within the boundaries of the mining claim.

After the Government established a *prima facie* case of lack of discovery of a valuable mineral deposit on the claim, the locator then had the burden at the hearing of showing by a preponderance of the evidence, not merely evidence of equal weight, that his claim is valid.

Multiple Mineral Development: Common Varieties 3511

The Department has looked to the marketability of sand and gravel as an essential factor in determining whether a deposit is valuable within the concept of the prudent man test long prior to the enactment of the act of July 23, 1955.

A valid mining claim located for common varieties of sand and gravel must be located prior to July 23, 1955, and it must be shown that prior to that date, and at all times thereafter until patent issues, the sand or gravel deposit can be extracted, removed, and marketed at a profit. This includes a favorable showing as to the accessibility and quantity of the deposit, *bona fides* in development, proximity to market, and the existence of a present demand at all such times for the sand and gravel.

United States of America v. *Joe L. DeVaney*, Sacramento Contest No. 076387
(January 17, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 FEB 14 AM 10 00

In reply refer to:
704
Sacramento Contest
No. 076387

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

January 17, 1966

Certified Mail
Return Receipt Requested

DECISION

United States of America, Contestant v. Joe L. DeVaney, Contestee-Appellant	Indian Camp Placer Mining Claim located in sec. 2, T. 6 S., R. 22 E., M. D. Mer., California, within the Sierra National Forest.

Decision Affirmed

Mr. Joe L. DeVaney has appealed from the Hearing Examiner's decision, dated September 15, 1964, determining that the above-identified mining claim is invalid for the reason that no discovery of a valuable mineral has been made within the boundaries of the claim.

The mining claim was located by Mr. DeVaney on November 10, 1954, for rock, sand, and tungsten (Tr. 119-120, Exh. 1). At the request of the Regional Forester (California Region), Forest Service, United States Department of Agriculture, a contest complaint was issued against the mining claim charging, in pertinent part, that a deposit of valuable mineral of sufficient quantity to constitute a valid discovery is not shown within the boundaries of the mining claim. A hearing was held on June 17, 1964, before the Hearing Examiner; the Government was represented by the Office of the General Counsel, United States Department of Agriculture; the mining claimant appeared personally and was represented by counsel.

At the hearing the mining locator testified that he had found no tungsten on the mining claim, but claimed a discovery for tungsten because there were tungsten mines in the area (Tr. 120). The concentrate of samples of material removed from the claim by a qualified mineral examiner was assayed, and the assay report shows no tungsten trioxide (WO_3) present in the material (Tr. 19, Exh. 6). If surrounding claims are successfully mined, this fact could raise a geological inference that there is a like mineral deposit to be found on the mining claim in question, but the Department has never accepted such inference as a substitute for the actual discovery of a valuable mineral deposit within the boundaries of the mining location in issue. See United States v. Melvin L. Nevitt, A-30030 (July 28, 1964). Moreover, the mineral examination of the mining claim negates even an inference of valuable tungsten deposits having been exposed on the claim.

From the cited evidence it is clear that there has not been a valid discovery of a tungsten deposit within the boundaries of the Indian Camp Placer Mining Claim, so consideration will now be given to the asserted validity of the claim for sand and gravel.

Mr. DeVaney testified that the plant he proposes to assemble on the mining claim will as now planned only make road base (Tr. 152). The mining claimant introduced testimony that the material on the claim is satisfactory for processing into road base and possibly aggregate. 1/ Such materials are "common varieties" within the purview of section 3 of the act of July 23, 1955 (30 U.S.C. § 611 (1964)). For an explanation of what constitutes common varieties, see 43 CFR 3511.1(b) of the departmental regulations. The cited act precludes the location of claims for common varieties of sand and gravel under the general mining laws. The mining claim is asserted to have been located prior to enactment of the 1955 act, supra, but such location must be valid prior to July 23, 1955 to be effective.

With respect to widespread nonmetallic material, whether a particular deposit is a valuable mineral deposit within the contemplation of the mining laws, the rule has long been laid down by the Courts and the Department that to justify possession a mineral claimant must show that by reason of accessibility, bona fides in development, proximity to market, existence of a present demand, and other factors, the deposit is of such value that it can be mined, removed, and disposed of at a profit. See Layman v. Ellis, 52 L.D. 714 (1929); Opinion of the Acting Solicitor, 54 I.D. 294 (1933); Ickes v. Underwood et al., 141 F.2d 546 (1944); and United States v. Strauss et al., 59 I.D. 129, 138 (1945). The appellant in his appeal questions whether the marketability test is applicable to a sand and gravel claim located prior to enactment of the act of July 23, 1955, supra. The Department discusses this point extensively in United States v. United States Silica Corporation et al., A-30400 (August 24, 1965). Briefly, the cited decision shows that the Department has long looked to the marketability of a mineral as an essential factor in determining whether a deposit of such minerals as those in issue are valuable within the concept of the "prudent man test" discussed in Mr. DeVaney's appeal. The United States Silica Corporation decision, supra, cites Bennett et al. v. Moll, 41 L.D. 584, decided in 1912; Stanislaus Electric Power Company, 41 L.D. 655, also decided in 1912; and Layman v. Ellis, supra, decided

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1/ Such mineral material as sand, gravel, shells, slag, or broken stone, or combinations thereof, with which cement or bituminous material is mixed to form a mortar or concrete.

in 1929--all decisions requiring a showing of marketability rendered prior to the 1955 act. The requirement as to marketability was in existence at the time Mr. DeVaney purported to locate the sand and gravel claim in issue, and in order to show a valid discovery he must show that the deposit on the claim could successfully be marketed prior to the time such locations were precluded by the act of 1955, supra, and at all times thereafter.

The mining claimant testified at the hearing that since the location of the mining claim the only material he has removed and sold from the claim is about $1,000 to $1,200 worth of "leach rock" 2/ (Tr. 153). He testified that he has not developed the claim because, among other reasons, the road to the claim can only be used four or five months in each year (Tr. 124), and the market for road base was insufficient to warrant investing in the claim the money necessary to develop it (Tr. 125). Mr. DeVaney testified that road base in the area in the past has been obtained by users from abandoned mine tailings, and this source is now almost depleted (Tr. 153), so he is of the opinion that now there is a demand to purchase road base from the mining claim (Tr. 125-126).

In Foster et al. v. Seaton, 271 F.2d 836 (1959), the Court held that to allow land containing sand and gravel deposits to be removed from the public domain because unforeseeable developments might some day make the deposits commercially feasible cannot implement the congressional purpose in encouraging mineral development; there must be a present demand for the material at all pertinent dates. The locator's testimony shows that there was not such a demand for the material on the claim prior to July 23, 1955. Moreover, the fact that the claim was never developed into a profit-seeking mine is at least some indication that the owner did not believe there was such a present demand at any time for the deposits on the claim. Cf. United States v. Fisher Contracting Company et al., A-28779 (August 21, 1962); United States v. Everett Foster et al., 65 I.D. 1, 7 (1958).

In his appeal, the appellant states, in substance, that the evidence shows that there is material on the mining claim having a saleable use in the market place, and asserts that the evidence is insufficient to support a finding that there has been no valid discovery of valuable minerals within the limits of the claim. As shown, mere evidence of a possible future market for material on the claim is insufficient, there must have been an existing market prior to July 23, 1955, and a continuing market thereafter. The evidence cited by the appellant is insufficient to show a valid discovery for sand and gravel on the claim in issue.

2/ Mr. DeVaney may have been using a local term for caliche which includes gravel, sand, or desert debris cemented by porous carbonate.

The evidence introduced on behalf of the contestant at the hearing supports the finding that there has been no valid discovery of valuable minerals within the limits of the claim. Government mineral examiners testified that they examined the claim, had tests made of samples removed from the claim, and, based upon the foregoing, are of the opinion that the material on the claim is insufficient in quantity and inadequate in quality for commercial use. After the Government established this prima facie case of lack of discovery of a valuable mineral deposit on the claim, Mr. DeVaney then had the burden of showing by a preponderance of the evidence, not merely evidence of equal weight, that his claim is valid. See United States v. J. S. Devenny, A-30031 (June 19, 1964). In fact, the preponderance of the testimony, and especially the testimony of the locator himself, establishes that there was no valid discovery on the mining claim at the time of the purported location, nor at the time of enactment of the act of July 23, 1955, supra, nor at the time of the hearing, nor at any intervening time. As stated by the Hearing Examiner, there is no evidence of a present market for material from the claim (extraction, processing, and sale at a reasonable profit), merely a proposed operation in the future projected upon a possible market yet to be established.

Mr. DeVaney testified that he was of the opinion that there was sufficient tonnage of material on the claim to supplement his operation on another claim a few miles away, but he stated that since no test holes have been drilled on the gravel bar the amount of material on the claim is guesswork (Tr. 126). Such testimony does not refute the testimony of the Government mineral examiners that the quantity of material is inadequate to warrant investing time, money, and labor in such an operation. In the absence of sufficient exploration done prior to July 23, 1955 to reasonably determine the quantity of usable material on the claim, there has not been a valid discovery, since a person of ordinary prudence would not be justified in investing time, money, and labor in assembling the necessary expensive equipment to process the material, and then extracting the material, in the absence of more certain evidence that the quantity of usable material is sufficient to show a reasonable prospect of operating at a profit.

The appellant has not made a showing on appeal which warrants changing the decision appealed from. Accordingly, the decision of the Hearing Examiner determining the mining claim in issue null and void is affirmed.

Mr. DeVaney is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of showing wherein the decision appealed from is in error.

In the event an appeal is taken the attorney for the adverse party who must be served is:

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San Francisco, California 94111

James F. Doyle
Chief, Office of Appeals
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Forest Service, Div. of Recreation, U.S.D.A. (8)
Office of the General Counsel, Div. of Lands and Forestry, U.S.D.A. (2)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Hearing Examiner John A. Wood (Sacramento)
Administrative Assistant, Hearings and Appeals
Gower Federal Service
Appeals List No. 1
JHO'D

appeal to Sec
affirmed A-30606
10-25-66

DOCKET FILES

Mining Claims: Determination of Validity 3400.1

In a contest against a mining claim, the Government has the burden of establishing a prima facie case against the validity of the claim and the burden then shifts to the claimant to prove validity of the claim by a preponderance of the evidence.

To constitute a valid mining claim, there must be such a discovery of valuable minerals as would warrant a prudent man in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

Mining Claims: Hearings 3482

A request for a further hearing to present new evidence will be denied where there is an insufficient showing that further evidence will be produced which the contestees were unable to produce at the previous hearing and which would be material to the issues in the contest proceeding.

United States v. George C. Johnson et al., Sacramento Contest No. 073675
(February 28, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 MAR 15 AM 10 00

In reply refer to:
704
Contest No. Sacramento
073675

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

February 28, 1966

Certified Mail
Return Receipt Requested

DECISION

United States of America :
Contestant :
v. :
George C. Johnson and :
Robert A. Johnson
Contestees :

Involving the Rifle Barrel placer mining claim embraced within the $N\frac{1}{2}SE\frac{1}{4}SE\frac{1}{4}$ Sec. 1, T. 3 S., R. 15 E., M.D.M., recorded in Vol. X, page 475, Official Records of Mariposa County, California.

Decision Affirmed
Request For Further Hearing Denied

The contestees have appealed from a Hearing Examiner's decision, dated July 17, 1964, which declared their Rifle Barrel placer mining claim null and void for lack of a valid discovery and also held that the land within the limits of the claim is nonmineral in character.

The Hearing Examiner concluded that the examination of the claim and the results of the sampling by the mining engineer for the contestant showed insignificant values for gold or other minerals, and that, based upon his findings, the engineer was of the opinion that a prudent man would not spend further money or effort with a reasonable prospect of developing a paying mine. He also concluded that the evidence submitted by the contestees falls far short of the requirements necessary to sustain the burden of proving a valid discovery,

Contestees' reasons for appeal can be summarized as follows:

(1) The testimony of both contestees shows that they have mined gold on the property each year since 1951, using a hired bulldozer to strip the overburden, sluicing the gravel from next to bedrock, cleaning the bedrock very carefully and producing gold in paying quantities.

(2) The Hearing Examiner has disregarded as false the sworn testimony of the two claimants on the basis of only a sketchy examination by a Bureau engineer without any successful placer mining experience.

(3) The Bureau engineer could hardly be considered qualified to judge whether any property has placer gold or how much, since he never found any gold of consequence. They state he testified that in all his experience in gold placer mining, the most gold he ever found was one-tenth ounce in New Mexico and the most he ever found in a California claim was 20 milligrams or 25 milligrams, and that if this is the most gold he found, in all the claims he said he examined, he simply does not know how or where to find gold.

(4) The Bureau engineer testified to three visits to the property during which he took samples from four points. From each of these points, he gathered a 5-gallon can of material and from another two 18-inch pans. On the basis of an analysis of this material he extrapolated into a value per cubic yard of the 6,400 cubic yards of gravel he estimated were on the property; that he admitted on cross examination that placer gold is not uniformly distributed throughout the placer gravel but varies widely as to concentration and tends to locate at the bottom of gravel deposit because it is heavy; that the claimants testified that they would not even have sluiced two of his samples and that his other samples were marginal--none from the zone of real production.

(5) The Johnsons produced a sample of gold mined and a mint receipt for one sale of 3.60 ounces for $101.87 on January 3, 1963. They testified that they had in the past, when nobody was contesting the claim, disposed of their gold from the claim to various people and kept no record of it, and that the Bureau engineer testified that on his visit to the property on August 21, 1962 there was an ounce of gold in the sluice box.

(6) The claimants testified that they wanted the Government examiner to work a virgin area next to bedrock, which he did not do; that he never made any attempt to mine the property at the places and in the way the Johnsons had proved to be successful.

(7) The proceeding was extremely unfair and a denial of due process of law--due process requiring fairness, a judicial process, and at least an impartiality of judgment which did not exist.

The record in this case, consisting of the transcript of the hearing, the exhibits and the appeal, has been carefully examined. The testimony and evidence adduced at the hearing have been adequately summarized by the Hearing Examiner. There is no need for a detailed narration of the testimony and evidence in this decision.

In a contest brought against a mining claim, the Government has the burden of establishing a prima facie case against the validity of the claim and the burden then shifts to the claimant to prove validity of the claim by a preponderance of the evidence. United States v. Jesse Edwards, A-28145 (January 20, 1960); Foster v. Seaton, 271 F.2d 836 (D. C. Cir. 1959); United States v. Robert Hight et al., A-30256 (April 21, 1965). To constitute a valid mining claim, there must be such a discovery of valuable minerals as would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894); Chrisman v. Miller, 197 U. S. 313 (1905); United States v. Ford M. Converse, 72 I.D. 141 (1965).

The discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values. United States v. Josephine Lode Mining Development Company, A-27090 (May 11, 1955); United States v. Richard L. and Nellie V. Effenbeck, A-29113 (January 15, 1963); United States v. John L. Cooper et al., A-30267 (May 11, 1965).

In the Cooper case, supra, the Department said: "The Department has held that there is a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. It is only when the exploratory work shows that minerals exist in such quantities and such values that there is a reasonable prospect of success in developing a paying mine that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961)." The mere willingness of mining claimants to expend further time and money in exploration is insufficient to establish the presence of a discovery on a mining claim. United States v. Robert Hight et al., supra.

There are vast tracts of country in the mining states which contain precious metal in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term "mineral", in the sense of the statute, is applicable. Davis v. Weibbold, 139 U.S. 507; United States v. Bullington, 51 L.D. 605.

The appellants' contentions on appeal will be reviewed under the mining laws and in light of the above principles of case law formulated by the Courts and the Department, which govern as to the facts adduced at the hearing in this case.

(1) We do not question the testimony of the contestees that they have mined gold on the property each year since 1951. However, from the evidence offered by both contestees on direct testimony and on cross-examination, the contention that they have produced gold in paying quantities is highly questionable. There is no evidence to support that conclusion. This will be discussed in more detail later in this decision.

(2) There is nothing in the record to bear out the contention that the Hearing Examiner disregarded the testimony of the two claimants. His decision is based on the evidence assembled at the hearing. The record shows that the Bureau engineer was an experienced professional engineer and was qualified to give expert testimony. The evidence is that he visited the claim on three occasions making examinations; that he evaluated the mineral possibilities of the claim through approved and acceptable professional methods; he observed the topography of the land in the claim, eliminating the hilly portions and concentrated his attention on the creek bed gravels, which were the only areas on the claim likely to contain gold, sampling at four points, taking three out of four samples at points which the claimants pointed out to him where they had obtained gold and which they considered the most likely points to sample.

(3) The contestees contend that the Bureau's engineer is not qualified to judge a gold placer because he does not know how or where to find gold, as he testified that in all of his gold placer experience the most gold he had ever found was one-tenth ounce in New Mexico and the most in a California claim was 20 or 25 milligrams. His qualifications were established on direct examination. He estimated that in his career he had examined approximately 200 mining claims of which some 60 claims were placer gold claims (Tr. 9), and of which some 30 of the placer gold claims were in California (Tr. 10). On direct examination, claimants' counsel failed to impeach his qualifications. The fact that in all the claims that he had occasion to examine the most gold he was able to find in any of the claims was in relatively insignificant values is certainly no proof of his lack of qualifications to evaluate a gold placer claim.

(4) Contestant's Exhibit No. 3 is a map of the claim prepared by the Bureau's engineer. In the northerly half of the claim, Willow Creek crosses it in a generally west-easterly direction, with a small tributary coming in from the northwesterly portion of the claim. He has delineated on the map a relatively small area containing the stream beds and gravel deposits, which can contain gold, the remainder of the claim consisting of hill topography. He estimated the total amount of recent placer gravel that could possibly carry gold to be approximately 6,400 yards; this was estimated by pacing the area and estimating the depth from points where bedrock was exposed and from depth to bedrock at a point which the contestees had told him (Tr. 32 and 33).

He took three samples at points pointed out to him by Mr. Johnson as being good points to sample, that might have values and which were indicated by Mr. Johnson as being the points of discovery, which he claimed as discovery points (Tr. 35). His fourth sample had been taken upon his first visit to the claim when neither of the contestees was present. He stated the purpose of taking this sample was to try and find an area in new bedrock that might carry gold (Tr. 35). At the places pointed out by Mr. Johnson, the engineer, assisted by another Bureau engineer, took 5-gallon buckets of sample material, which is equivalent to one fortieth of a cubic yard of material, (Tr. 36 and 37). From the three 5-gallon samples they weighed out respective values as follows: Sample No. 1, three and one-half milligrams of gold equivalent to 14 cents per cubic yard; Sample No. 2, one-half milligram of gold, which is equivalent to two cents per cubic yard; and Sample No. 3, one-half milligram of gold equivalent to 2 cents per cubic yard. At Sample point No. 4 the sample was taken in an 18-inch gold pan equivalent to one hundred and fiftieth of a cubic yard (Tr. 37) in which he counted four colors, or approximately .5 milligrams, which would be in the neighborhood of 10 cents per cubic yard of material (Tr. 39). He gave his opinion that based upon his examination of the claim he did not find sufficient minerals within the limits of the claim which he believed would warrant a prudent man to expend his time and money in further effort to develop a paying mine (Tr. 44).

It is a fact that he admitted on cross-examination that placer gold is not uniformly distributed throughout placer gravel and that the gold tends to locate at the bottom of a gravel deposit because it is heavy. These statements are of no consequence, however, because he sampled at all of the places pointed out by the claimants as being their discovery points where they had found gold and where the gold was most likely to be. He admitted that Mr. Johnson wanted him to take one more sample--other than the three places pointed out--north of the highway (which was on the small tributary stream), but that he did not do it because they (the two Bureau engineers) had found no indication of sufficient values in their samples, did not think an additional sample was necessary there and because there were insufficient gravels to warrant any type of exploration north of the highway (Tr. 34). The claimants did testify that they would not even have sluiced two of the Bureau engineer's samples and that his other samples were marginal, none from the zone of real production. Yet three of the samples were taken from points indicated by the contestees as places where they had produced gold and where they thought gold was most likely to be found. Thus the Government's evidence and testimony established a prima facie case.

(5) The only tangible evidence produced by the contestees as to value of gold mined from the claim was a receipt for one sale of 3.60 ounces of gold to the United States mint for $101.87 on January 3, 1963, which one of the contestees testified was gold sluiced out of the area in the 1962-1963 period. They introduced no direct evidence as to the amount of time spent in producing this gold or as to the cost of production, although on cross-examination the witness estimated that they sluiced maybe 10 to 15 yards of material (Tr. 63) and in reply to a question of the Hearing Examiner he stated that he thought they could sluice one cubic yard a day pretty easily. (Tr. 74).

The witness produced a little jar of gold which he testified came from the claim, but nowhere was it brought out in the testimony how much gold it was, the value, or over what period of time it was produced. The witness testified that they had produced gold in the past, which they had disposed of to various people, but kept no record of it, and did not know or have any idea how much gold they had mined since 1951. He testified that between the two of them, they mined about 44 days each year and mining was done by hiring a man and bulldozer to scrape off the overburden and then they did the rest of the work themselves with hand tools, scraping bedrock and running the material recovered through the sluice box. The witness's answers were vague as to the amount of gold produced and as to the cost of producing the gold both in money and their own labor. There was no evidence as to the cost of hiring the bulldozer work. Testimony of the other contestee was practically nothing more than a corroboration of the first witness and his answers were equally vague. The Bureau engineer did testify that on his visit to the claim on August 21, 1962, one of the contestees did show him what he estimated to be approximately an ounce of gold in his sluice box. The contestees testified that they had a mining engineer look at the claim but the cost of things he wanted to do would be prohibitive and exorbitant (Tr. 71, 72 and 88).

The most that can be said for the contestees' evidence is that they have recovered isolated bits of gold over a period of years. There is no evidence of a discovery within the meaning of the mining laws, although they may feel that they are justified in further exploration. The fact that they may be willing to spend their money and effort on the claim in further exploration is insufficient to establish the presence of a discovery on the claim. United States v. Robert Hight et al., supra.

(6) The contention of the contestees in their appeal that the Bureau engineer did not work virgin area on the claim next to bedrock as they had wanted him to do has no bearing. He had no duty to test the claim for a discovery beyond examining the discovery points made available by the mining claimant. United States v. Ford M. Converse, supra. The contestees failed to overcome the Government's *prima facie* showing by a preponderance of the evidence.

(7) The contestees have presented nothing to substantiate their contention that the proceeding was unfair and a denial of due process of law. There is nothing in the record to indicate any bias on the part of the Hearing Examiner, nor did the appellants furnish any cogent reasons to support their conclusions that the hearing was conducted in a manner which was unfair to them. It requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that the hearing was unfair. United States ex rel. De Luca v. O'Rourke, 213 F.2d 759, 763 (8th Cir. 1954); United States v. Ford M. Converse, supra. The unsubstantiated allegations of the appellants do not establish bias or unfairness on the part of the Hearing Examiner. The hearing was

conducted in accordance with the regulations of the Department relating to Hearing Procedures, which are in accord with the Administrative Procedure Act (5 U.S.C., 1964 ed., § 1001 et seq.). The Hearing Examiner conducted the hearing in a fair and impartial manner and his decision is in accord with the law and the weight of the evidence presented.

Accordingly, the Hearing Examiner's decision of July 17, 1964 declaring the claim null and void, is hereby affirmed.

On September 9, 1964, subsequent to the appeal, the appellants filed a request for further hearing to present newly-discovered evidence of valuable mineral deposits. The request was accompanied by an affidavit by Robert A. Johnson, one of the appellants. The substance of the affidavit is that after the Hearing Examiner's decision, the appellants sampled one of the points sampled by the Bureau's engineer; that they dug down the same hole two feet closer to bedrock, from which they removed one pan of gravel weighing eight pounds and recovered a total of 0.2 grams of gold, having a value of "$50 per ton of placer in gold (plus silver--see mint receipt in evidence). I was not able to conduct further sluicing operations at the time due to low water, but I did move 50 yards of overburden by dozer in preparation for sluicing when the fall rains come."

We do not feel that this showing is sufficient to order a further hearing in this case. The mint receipt referred to by Mr. Johnson was not attached. However, even if it were received and available for our inspection, the showing made by the appellants would not be a sufficient basis for ordering a further hearing. Although Mr. Johnson did state in his affidavit that the sample was taken from one of the points sampled by the Bureau engineer after digging two feet closer to bedrock, there is no showing made as to size, extent or character of the material from which the pan of gravel was taken. He did not state how much material was dug and removed in taking the one pan of gravel in which the mineral was found. Samples and assays without sufficient data of extent of the mineral material sampled can mean little or nothing of evidentiary value. United States v. Northern Pacific Railway Co., 1 F.2d 53, 57.

A request to reopen a hearing proceeding will be denied where there is an insufficient showing that further evidence of a discovery will be produced, whi contestees were unable to produce at the previous hearing and which would be material to a determination of the issues. United States v. C. F. Snyder et al., 72 I. D. 223 (May 26, 1965). See also United States v. James E. Hubbart, A-30205 (November 27, 1964) and United States v. Arizona Exploration Company et al., A-28876 (June 22, 1962). The request is, therefore, denied.

The contestees are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington,

D. C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

If an appeal is filed, the adverse party to be served is:

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OPD
Gower Federal Service
Appeals List No. 1
PLS

appeal to Sec.
affirmed in Part - Remanded A-30611
6-28-68

DOCKET FILES

Mining Claims: Determination of Validity 3400.1

Where certain widespread nonmetallic materials suitable for use as constituents in the manufacture of cements are without commercial value until a plant is available to process the materials, and where no such plant has been constructed conveniently near, mining claims located for the materials are invalid, since without a means of processing the materials the required present market for the materials on the claims has never existed.

State of California v. E. O. Rodeffer, Riverside Contest Nos. 0106494 etc. (March 3, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 MAR 16 AM 10 00 (3)

In reply refer to:
704
Riverside Contest Nos.
0106494
0125042
0126829
0134989

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

March 3, 1966

Certified Mail
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DECISION

State of California, Contestant,	:	Mountain Top Nos. 15, 16, and 17 placer mining claims located in sec. 25; Cordelia placer mining claim located in sec. 29; Mountain Top Nos. 20 and 22 placer mining claims located in sec. 22, T. 4 N., R. 2 E., San Bernardino Mer., California.
v.	:	
E. O. Rodeffer,[1] Contestee-Mining Claimant.	:	

Mining Claims Declared Null and Void

Bureau decision of July 10, 1964, concerning the State of California amended exchange application Los Angeles 0134989, ordered a hearing in accordance with Hearings Procedures, Subpart 43 CFR 1852 et seq. to determine the validity of the Mountain Top Nos. 20 and 22 mining claims embraced within lands sought by the State. The decision ordered that following the completion of the hearing, the appointed hearing examiner would make a recommended decision which, together with the record, was to be submitted to the Director for initial decision in accordance with 43 CFR 1852.3-8(c). See Mansell O. La Fox et al., 71 I.D. 199, 202 (1964).

At the request of the contestee, the hearing in Contest No. 0134989 was consolidated to include Contest Nos. 0106494, 0125042, and 0126829, since, as indemnity for loss of grants of school lands in place, the State of California had selected lands in the same township which also embrace Rodeffer-owned placer mining claims--the Cordelia, and the Mountain Top Nos. 15, 16, 17, and (again) 20. The parties were notified at the hearing that the Director's initial decision would relate to all four mining contests involved in the hearing, and no objection was made (Tr. 6-7).

In pertinent part the charge in each contest complaint filed by the State against the mining claims conflicting with the State school indemnity selected lands, is that such land is nonmineral in character and cannot now or in the foreseeable future be mined profitably. The contestee answered in each proceeding and denied the charges.

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[1] In each contest proceeding locators Samuel O. Duvall & Associates were named originally as the contestees. Thereafter, by amendment, Mr. Rodeffer as purchaser (Tr. 75) and present owner (Tr. 59) of all of the claims in issue was substituted as contestee. Mr. Rodeffer testified that he also participated in the location of the claims (Tr. 75).

Pursuant to notice, a hearing in the proceedings was held before Chief Hearing Examiner Graydon E. Holt on October 7, 1965. The State of California was represented by its Office of the Attorney General. Mr. Rodeffer appeared personally and was represented by Mr. Ronald E. Gother of the law firm of Gibson, Dunn & Crutcher. The record (see 43 CFR 1850.0-8) has been carefully reviewed.

Mr. George W. Ginn, a geologist employed by the State of California, testified at the hearing that he was on the claims in issue during April 1960 and again in June 1964. The claims are in the Lucerne Valley five or six miles northeast of Blackhawk Mountain and are accessible by road to Victorville. He described the claims as being generally flat, sloping gently toward the northeast and with ridges created by erosion from torrential rainstorms. On each of the claims he found a number of bulldozer cuts from three to six feet deep. Within each of the cuts there is a whitish lime material exposed in minor amounts. On the nearby Blackhawk Mountain there is a massive limestone deposit referred to as "Blackhawk Breccia" which is over 90% calcium carbonate and four or five companies are producing Portland cement from this material. Mr. Ginn ascribed the genesis of the lime material on the claims in issue to landslides and water erosion from this Blackhawk Breccia deposit followed by the subsequent evaporation of the water. In addition he found a few scattered pieces of limestone intermingled with heterogeneous igneous rocks, but not in quantity to warrant mining (Tr. 40). Mr. Ginn concluded with the opinion that there is not a mineral deposit on the claims in issue and that what limestone there is could not compete with the massive deposits found in the mountains a few miles away (Tr. 37). He believes that the Blackhawk Breccia formation might extend under the claims but at an unknown depth (Tr. 42-44).

Mr. Rodeffer, the contestee, testified that he is the president of a ready-mix concrete company which uses approximately 500 thousand barrels of cement a year, and has a gross business of twelve million dollars a year (Tr. 55-56). Mr. Rodeffer testified that he acquired forty "Mountain Top" associated placer claims in the 1950's with the intention of constructing a plant to produce concrete for use in his business. This would give his company its own raw material. In addition to the Mountain Top claims, he owns another group of claims five or six miles away which are alleged to be on a deposit of high grade limestone. He testified that while there are many deposits of limestone in the area, particularly along the Colorado River, the claims in issue are conveniently located and are accessible by road and near a railroad. The claims in issue would supplement his claims having quality limestone to support a cement plant for an extended period of time and have all the necessary elements for cement. These elements include calcium carbonate, iron, silica, alumina and others which are readily available either on the claims or in the area. Much of his information regarding the quality and quantity of the material on the claims is based on a report (Exh. B) dated February 8, 1957, prepared by a Mr. Alexander Klein.

Mr. Rodeffer is of the opinion that a cement plant on his group of forty claims could compete with other plants in the area. His present intention is to attempt to sell his claims in the area to an association which has been having the claims investigated by Mr. Robert E. Freeland, a geologist, to determine the feasibility of a cement plant for the production of Portland cement in the indefinite future (Tr. 71-73). Except for a few loads of breccia material sold in about 1950, the mining claimant testified that no material has been removed from the claims for commercial purposes (Tr. 103).

Mr. Freeland testified that he has been investigating limestone properties exclusively for the past ten years and has recently been retained by the association to investigate the Rodeffer claims. Although his investigation has not been completed he has flown over the area, studied the Klein and Bureau reports, and is having tests made of material near the Cordelia claim. The reports refer to both marl and caliche on the claims. Mr. Freeland stated that marl is a siliceous material with from 30% to 34% calcium carbonate, and that both marl and caliche can be used as a constituent material in the manufacture of Portland cement (Tr. 89). Mr. Freeland expressed the opinion that the material on the claims is commercially useable (Tr. 90). The witness testified that caliche would be found throughout the desert area, especially near an area of lime-bearing rock such as the Blackhawk Breccia (Tr. 95).

Although John Kinard did not testify, the parties stipulated (Tr. 99-101) that had he been called he would have stated that he is president of the association which is negotiating with the contestee to purchase the property and that he has been in the cement manufacturing business for the past twenty years. He would have testified that the market is sufficient for an additional cement plant and that he proposes capitalizing the new company for twenty million dollars to build such a plant. Also he has read the Klein report and discussed the claims with Mr. Rodeffer. If the claims discussed in the report contain the quantity and quality of material referred to in the report, he would want them for his new company and could use them profitably for making cement.

Mr. Klein was not a witness at the hearing and thus was not available for cross-examination. Without the presence of the author of the report (Exh. B) at the hearing for examination concerning the basis for the conclusions in his report, his report cannot be given the weight the same statements might be entitled to otherwise. Mr. Klein is on the teaching staff of the University of California at Berkeley and is in charge of the Engineer Material Laboratory, and has done research on problems of developing cement.

The Klein report is a dissertation on the cement manufacturing industry in general and a mineral evaluation of the south half of the Cordelia--as well as certain other Rodeffer-owned mining claims not in issue in these proceedings (Tr. 88). In fact the mining claims discussed in the report, except for the Cordelia, are one to three miles from the mining claims in issue. Without attempting to quote extensively from the Klein report, the author found that marl from the Cordelia can be combined with limestone from other sources to produce Portland cement. He described the marl from the Cordelia as a desirable siliceous material which can be used in quantities of 54% with high grade limestone, and stated that marl is preferable to common clays for cement manufacturing. The area closest to the Mountain Top claims in issue is shown, on a contour map attached to the report, as having low grade ore.

The Bureau report to which the parties make reference at the hearing (Tr. 48-51, 67), prepared by Mr. G. W. Nielson, a mining engineer employed by the Bureau of Land Management, is dated December 4, 1959, and concerns an examination the author made of the area on July 28, 1956 and April 28, 1957. The report is in the case files. Mr. Nielson was not called as a witness at the hearing, so again the conclusions of the author were not subject to examination. The report relates to many Rodeffer-owned mining claims in the area including the claims in issue. The author is of the opinion that the lands embraced within the Mountain Top Nos. 16 and 17 mining claims are nonmineral in character, and the other claims in issue embrace sufficient exposed marl deposits to warrant classifying lands in such claims as mineral in character. Mr. Nielson agrees that utilization of the mineral materials on the mining claims is dependent on the construction of a cement or other processing plant and that without such a plant the materials are without commercial value.

From the evidence adduced at the hearing we make the following Findings of Fact:

The mineral materials on the subject mining claims consist of lime-bearing marl and caliche, and sparse pieces of limestone. Such materials, varying in quality and quantity, are found throughout the desert in the vicinity of high quality limestone deposits. The lime by leaching and erosion has been, in varying degrees, spread throughout the general area where it has soaked into other materials in the vicinity. The mineral materials on the mining claims in issue can be used in cement manufacture and are superior for such use to common clays, but, nevertheless, the materials are merely a constituent material.[2/] The mineral materials exposed on the mining claims in issue have had no present market at any time, because there has never been a processing plant available, and in the absence of such a plant the mineral materials on the claims have no commercial value. The contestee has no plans to construct such a plant, but merely hopes to sell the claims to an association that has not agreed to purchase the claims nor determined that the construction of a plant for such material is feasible. Mr. Rodeffer acquired the mining claims in 1950 (Tr. 75), and the contest record is uncertain as to the length of time the locators (Samuel O. Duvall & Associates) held the claims prior to 1950, but other than selling a few loads of breccia material in 1950, no commercial use has been made of the claims--and the record is not clear that even this material was removed from the mining claims in issue (Tr. 103). The fact that the claims were never developed into a profit-seeking operation is at least some indication that the owner did not believe there was such a present demand at any time for the materials on the claims to warrant

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[2/] Such mineral materials are "common varieties" of stone within the purview of section 3 of the act of July 23, 1955 (30 U.S.C. § 611 (1964)), and not the particular deposit of mineral materials occurring commonly but having "distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation" nor the ". . . Limestone suitable for use in the production of cement . . ." referred to in excerpts cited by the contestee from the departmental regulation (43 CFR 3511.1(b)) which explains what constitutes "common varieties" under the act. The material is not quality limestone, and merely because it is superior to common clays as a constituent material does not give the materials distinct and special properties such as would exclude them from the common varieties category. The use to which a common material is put cannot make the lands in which it is found subject to location under the mining laws, if the use is not dependent on any unusual characteristic of the material itself. Cf. United States v. Mary A. Mattey, 67 I.D. 63, 68 (1960).

The act of July 23, 1955, supra, precludes the location of mining claims for common varieties of stone such as the materials found on the mining claims in issue. The Cordelia may be the only mining claim in issue located prior to the effective date of that act. However, the contest record is uncertain as to the dates of location of the mining claims in issue, so no determination is made at this time as to whether the subject mining claims, having been located for common varieties of stone, were located at a time when such materials were or were not locatable--that is, whether the claims were located prior to, or after July 23, 1955. Nevertheless, after July 23, 1955, the mineral materials exposed on the mining claims involved in these proceedings can only be disposed of pursuant to the Materials Act of July 31, 1947, as amended (30 U.S.C. § 601, 602 (1964)); see also 43 CFR 3610.0-3 et seq.

either constructing a plant or arranging for a plant to process the material into cement in competition with existing cement-making operations in the area. United States v. Fisher Contracting Company et al., A-28779 (August 21, 1962); United States v. Everett Foster et al., 65 I.D. 1, 7 (1958).

The Blackhawk Breccia formation of high quality limestone, by mere geological inference, may extend under the mining claims in issue. However, no significant quantities of limestone have been exposed on any of the mining claims in issue. Exploration on the claims has consisted only of bulldozer cuts of insignificant depth.

From the aforesaid Findings of Fact we make the following Conclusions of Law:

With respect to widespread nonmetallic material, whether a particular deposit is a valuable mineral deposit within the contemplation of the mining laws, the requirement has long been stressed by the Courts and the Department that to justify possession by a mineral claimant there must be a present marketability. See Foster et al. v. Seaton, 271 F.2d 836 (1959). As shown by the discussion in United States v. United States Silica Corporation et al., A-30400 (August 24, 1965), the marketability test is applicable even though a mining claim is located prior to the enactment of the act of July 23, 1955, supra; that decision cites cases decided as early as 1912 requiring a showing of marketability. The Court also states in Foster, supra, that to allow land to be removed from the public domain because unforeseeable developments might some day make the deposits commercially feasible cannot implement the congressional purpose in encouraging mineral development; there must be a present demand.

Since the marl and other widespread nonmetallic materials exposed on the claims suitable for use as constituents in the manufacture of cements are without commercial value until a suitable plant is available to process the materials, and since there never has been such a plant nor has there been a firm plan for the construction of such a plant, there never has been the required present market for the materials necessary to have a valid discovery of valuable mineral deposits within the purview of the mining laws on any of the mining claims in issue.

Accordingly, the Mountain Top Nos. 15, 16, 17, 20, and 22, and the Cordelia, placer mining claims are declared null and void.

The lands embraced within each of the mining claims in issue are mineral in character since the lands are prospectively valuable in that, by geological inference, the Blackhawk Breccia formation of quality limestone may extend under such lands. Since the State of California filed the indemnity lieu school selections involving the lands within the mining claims, the statute permitting such selections has been amended by the acts of August 27, 1958 and September 14, 1960 (43 U.S.C. § 851-852 (1964)) to allow the selections of lands mineral in character under specified conditions.

Mr. Rodeffer and the State of California are each allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the party appealing will have the burden of showing wherein the decision appealed from is in error.

If an appeal is taken by Mr. Rodeffer, the filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If all of the mining claims adversely affected by this decision are included, the total filing fee will be $30. If an appeal is taken by the contestee (Mr. Rodeffer), the attorney for the contestant who must be served is:

Office of the Attorney General
Department of Justice
State of California
600 State Building
217 West First Street
Los Angeles, California 90012.

If an appeal is taken by the State of California, that party is not required to pay an appeal filing fee, see 43 CFR 1844.2(b). If an appeal is taken by the State, the attorneys for the contestee who must be served are:

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James F. Doyle
Chief, Office of Appeals
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Gower Federal Service
Appeals List No. 1
JHO'D

appeal to Sec.
affirmed as modified

DOCKET FILES

Mining Claims: Determination of Validity 3400

The Mining Claim Rights Restoration Act of 1955 did not open to mining location land which was withdrawn for irrigation uses.

Sierra Natural Slab Granite Company, Riverside 05233 (March 7, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 MAR 28 AM 10 00
③

In reply refer to:
704
Riverside 05233

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

March 7, 1966

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DECISION

Sierra Natural Slab Granite Company	:	Mineral patent application involving Crowbar, Sierra No. 1 and Sierra No. 2 placer mining claims in sec. 14, T. 1 S., R. 26 E., M.D. Mer., California, within the Inyo National Forest.

Decision Affirmed

Sierra Natural Slab Granite Company has appealed from the September 8, 1964 decision of the Riverside district and land office, declaring the above-identified mining claims null and void and rejecting the patent application for them for the reason that the lands included in the claims were not on the dates of location of the claims subject to appropriation under the mining laws for nonmetalliferous minerals. The decision noted that the claims were located for building stone and gravel, and it stated that the lands were withdrawn from such location by Executive Order of August 30, 1916, in connection with irrigation and power uses, pursuant to the Act of June 25, 1910 (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497; 43 U.S.C. § 141). The decision stated further that the withdrawal has not been revoked nor have the lands been restored to mining location for nonmetalliferous minerals under the provisions of the Mining Claims Rights Restoration Act of 1955 (69 Stat. 681), as amended, in view of Section 2(c) thereof (30 U.S.C. § 621(c)).

Section 2(c) of the Mining Claims Rights Restoration Act of 1955, supra, provides:

> Nothing in this chapter shall affect the validity of withdrawals or reservations for purposes other than power development.

The appellant agrees that the lands were withdrawn from mineral location in 1916. However, it asserts, the lands are not suitable for irrigation and in view of the time which has elapsed without such development, the lands have been in effect restored from withdrawal for irrigation purposes. Therefore, the appellant contends, the lands were subject to location for the building stone and gravel deposits therein, pursuant to provisions of the Mining Claims Rights Restoration Act, supra, when the mining claims in issue were amended or relocated in 1956 and 1962.

The Order of Withdrawal signed by the President on August 30, 1916, states that the lands in issue are withdrawn from settlement, location, sale or entry and reserved "pending investigation and classification in connection with irrigation and power uses," pursuant to the 1910 and 1912 acts above referred to. Two purposes are enumerated in the withdrawal--irrigation and power. As noted by the district and land office, this withdrawal order has not been revoked; it has continued in effect. Although section 2 of the Mining Claims Rights Restoration Act, supra, operates to open lands withdrawn or reserved for power development or power sites to mining location from the effective date of the act, it provides also that the act does not open lands withdrawn for purposes other than power development. Therefore, although the act may have opened the power site lands to mining location from the effective date of the act, it had no effect on the existing withdrawal of the same lands for irrigation purposes. The lands in issue were therefore not open to mining location at the time these locations were made, or relocated, and the district and land office properly declared them null and void and rejected the patent application for them. See A. W. Kimball et al., 65 I. D. 166 (1958).

The appellant has not shown error in the decision appealed from, and that decision is affirmed.

Sierra Natural Slab Granite Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the filing fee will be $5 for each claim on which favorable action is sought, a total of $15 if the appeal covers all of the claims involved in this decision. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving by presenting positive and substantial evidence wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosure

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OPD
Geological Survey, Conservation Division (3)
Gower Federal Service
Appeals List No. 1
AHO

appeal to Sec.
affirmed A-30621 1-9-67

DOCKET FILES

Mining Claims: Discovery 3413

A mining claim will be declared null and void for lack of a discovery where, although the claim may have possibly been valuable for minerals in the past, it is not shown as a present fact that the claim is valuable for minerals.

A mining claim is properly declared null and void where the evidence shows only nominal gold values are present on the claim.

United States v. Orion L. Fenton, Sacramento Contest No. 073692
(March 14, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 MAR 28 AM 10 00

(3)

In reply refer to:
704
Mineral Contest No.
Sacramento 073692

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

March 14, 1966

Certified Mail
Return Receipt Requested

DECISION

United States of America, : Involving the Desire Quartz Lode
Contestant : Mining Claim embraced within the
: SW¼ of Lot 2 in the SW¼NW¼NE¼ of
v. : Sec. 26, T. 1 S., R. 15 E., M.D.M.,
: recorded in Vol. 22, Quartz Claims,
Orion L. Fenton, : pages 176 and 187, Official Records
Contestee. : of Tuolumne County, California.

Decision Affirmed

Mr. Orion L. Fenton has appealed from a Hearing Examiner's decision, dated August 24, 1964, which declared his Desire Quartz Lode Mining Claim null and void for lack of a discovery of valuable minerals and because the lands embraced by the claim are nonmineral in character.

The appellant appeared at the hearing without counsel and presented his case with the help and assistance of the Hearing Examiner.

Review of the testimony and exhibits presented at the hearing and of the Hearing Examiner's decision reveals that the pertinent evidence is adequately summarized in the decision and that the Examiner correctly held that the contestant had presented a prima facie case in support of the charges in the contest complaint and that no substantial evidence was presented by the contestee to the contrary. In view of the reasons presented for appeal by the contestee, further summarization of the evidence does not appear to be necessary, except as noted below in discussing the various reasons assigned for the appeal.

The appellant has stated, in summary, reasons for appeal, most of which were unsubstantiated allegations as follows: That he has been overruled and judged without counsel thereby depriving him of his Constitutional rights, and that the real facts were not allowed in evidence. He questions the qualifications of the Inspector, [1] stating that he presented assays from the poorest samples he could find and that he refused to take samples from ore that indicated it would show any value; that he refused to take samples from the discovery hole and only at his (the appellant's) insistence did he get in the hole to take samples; and further, that the inspector lied about various matters such as the location hole, the boundaries, the assays, and in stating that he (the appellant) had helped him take samples when he had not done so.

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[1] Refers to the Mineral Examiner who testified for the Government.

The appellant asserts further that he took an assay from surface outcroppings assaying $2.45 per ton in gold, and that a much richer sample which he took from the bottom of the hole was not considered as evidence; and, in addition, that he presented a notarized statement from the man who witnessed high grade ore being extracted from the location hole. He summarized experience that he had in owning and operating gold mines, then stated that he certainly would not have purchased the Desire Lode if he had not thought it to be a rich claim with a valid discovery made by a prudent man. He then questioned whether the locator of the claim had invalidated the claim by removing the high grade gold ore and stated that the mining laws do not state that a miner must leave gold ore in sight to keep a claim valid.

There is nothing in the record indicating that appellant was deprived of his Constitutional rights. The hearing was had in accordance with due process of law. It was conducted in accordance with the Administrative Procedure Act (5 U.S.C. § 1001 et seq.) and by a qualified Examiner appointed pursuant to that act.

The appellant has not shown what "real facts" were not allowed in evidence. Based upon the evidence presented by both parties at the hearing, the Examiner's decision is correct.

The Mineral Examiner who testified for the contestant was shown by education and experience to be qualified to examine and evaluate mining claims and to give expert testimony and opinion as to their validity. His qualifications were not refuted by the contestee at the hearing. The only statement he offered after the Mineral Examiner's qualifications were established was: "Well, I -- the qualifications here doesn't mean that a person can't be prejudiced. And that is the subject that can easily be the objection." (Tr. 9).

In questioning the Mineral Examiner's qualifications in his appeal, appellant stated that he had shown the Bureau's evidence to several mining engineers, whose opinions were that "it would be impossible to null and void a 20-acre mining claim in this highly mineralized area on two short visits." This must be regarded as a self-serving statement, without relevance in this proceeding. The decision here must be based on the record assembled at the hearing.

The appellant's contentions that the Mineral Examiner presented assays from the poorest samples he could find and refused to take samples from ore that indicated it would show value are not borne out by the hearing transcript. The Mineral Examiner took four samples from the alleged excavation pointed out to him by the contestee as his discovery hole, as well as a sample from each of two other excavations on the claim. All six samples showed only nominal values in gold. Whether he took samples in the alleged discovery hole only at the contestee's insistence is inconsequential because the evidence shows that he did take four samples from that hole.

The appellant's contention that the Mineral Examiner lied about various matters are bald allegations unsubstantiated by the record and not supported by any evidence offered by appellant. At the hearing, he did question the correctness of the boundaries of the claim with reference to the patented Criss Cross and Tiger Lode Claims as depicted on a map prepared by the Mineral Examiner (Contestant's Exhibit 4A). However, at the request of contestant's counsel, the appellant did indicate the position of the claim as he wished it to be shown by drawing pencil lines on Exhibit 4A (Tr. 22) and he then agreed that the claim was properly located as shown by the Mineral Examiner on Exhibit 4A but that the boundaries of the two patented claims were improperly located inasmuch as they should be moved in a northwesterly direction to coincide with the end lines of the Desire Lode Mining Claim (Tr. 23). This also agrees with Contestee's Exhibit D, which is a copy of plat of Mineral Survey No. 5416, showing the Criss Cross and Tiger Claims and on which the contestee drew in pencil his version of the location of the Desire Lode Claim. See Tr. 54 and 55.

As for appellant's denial that he had helped the Mineral Examiner take samples on the claim, the latter's only testimony to that effect was that he had taken a dump sample from a 2 x 6 x 2 trench, which might be considered high grade sampling. He stated that he tried to pick material with the help of Mr. Fenton that would show a good assay if there were any gold there (Tr. 29). There is no reason given by appellant to question the correctness of this statement.

The one sample from the discovery hole, which Mr. Fenton had assayed at $2.45 per ton (Contestee's Exhibit A) was a 6-inch strip taken across the face; he took a strip about 6 inches wide and possibly an inch or so deep along the vein for about a foot (Tr. 47). On questioning by the Hearing Examiner, Mr. Fenton acknowledged as correct that a 6-inch cut would have to be reduced by one-sixth in order to arrive at a true value, which would give his sample a value of less than 50 cents per ton (Tr. 50). His contention that a much richer sample he took from the bottom of the hole was not considered in evidence is not borne out by his testimony. He presented as Exhibit C a sack containing finely ground, powdery material, which he stated was a portion of the sample which he based his assay on (Tr. 53). Under such circumstances, it would have no probative evidentiary value.

The notarized statement (Contestee's Exhibit B) by the man who claims to have witnessed high grade ore being extracted from the location hole is merely hearsay. However, even conceding that the man's statements may be true, the preponderance of the evidence indicates that any mineral values that may have existed in the claim have been exhausted and there is no evidence of an existing discovery of valuable minerals such as to meet the requirements of the mining laws.

The appellant questions whether the locator had invalidated the claim by removing the high grade ore and then states that the mining laws do not state a miner must leave gold ore in sight to keep a claim valid. The answer is that a mining claim will be declared null and void where, although the claim may have possibly been valuable for minerals in the past, it is not shown as a present fact that the claim is valuable for minerals. United States v. David L. and Kathryn King, A-30217 (December 29, 1964).

In a contest challenging the validity of a mining claim for lack of a discovery of a valuable mineral deposit, the mining claimant must sustain the validity of the claim by showing a discovery of valuable mineral which is sufficient to justify a person of ordinary prudence in the expenditure of labor and means with a reasonable prospect of success in developing a valuable mine. A mining claim is properly declared null and void where the evidence shows only nominal gold values are present on the claim. See United States v. David L. and Kathryn King, supra, and cases cited therein.

The evidence shows that the Government established a prima facie case on the charges brought against the claim and that the appellant has failed to refute the showing made and to establish the validity of his claim.

It appears that the appellant never mined any gold on the claim, but that he has relied mostly on a possible discovery made by the original locator, whom his immediate predecessor in interest had told him had removed rich deposits of gold from the claim. He relied upon the so-called discovery hole pointed out to him by his predecessor in interest and was unable to point out any area on the claim from which samples indicating the presence of valuable mineral could be obtained. The most that can be said for his case is that the evidence shows only nominal gold values are present on the claim.

Accordingly, the decision appealed from is affirmed.

Mr. Orion L. Fenton is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

If an appeal is taken, the adverse party to be served is:

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Enclosures

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Hon. Harold T. (Bizz) Johnson, House of Representatives
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Div. of L&M S&T (4)
Div. of L&M PM (2)
Admin. Asst., Hearings
OPD
Gower Federal Service
Appeals List No. 1
PLS

appeal to Sec.
affirmed A-30633
12-15-66

DOCKET FILES

Mining Claims: Contests 3482

In a contest against a mining claim, the contestant has the burden of establishing a prima facie case against the validity of the claim and the burden then shifts to the contestee to prove validity of the claim by a preponderance of the evidence.

Mining Claims: Discovery 3413

There is a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. It is only when the exploratory work shows that minerals exist in such quantities and in such values that there is a reasonable prospect of success in developing a paying mine that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made.

United States v. Ray Sparks Caldwell and Esther Clark Caldwell, Mineral Contest No. Riverside 03783 (March 21, 1966)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 MAR 31 PM 2 37 ③

In reply refer to:
704
Mineral Contest
Riverside 03783

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

March 21, 1966

Certified Mail
Return Receipt Requested

DECISION

United States of America,
Contestant

v.

Ray Sparks Caldwell
Esther Clark Caldwell,
Contestees

Involving Yellow Giant Nos. 1, 2, 3, 4, 5 and 6 Placer Mining Claims embraced within Sec. 11, T. 11 N., R. 3 E., S.B.M., recorded in Book 444, pages 653, 654, 655, 656, 657 and 658, respectively, Official Records of San Bernardino County, California.

Decision Affirmed

Mr. Ray Sparks Caldwell and Mrs. Esther Clark Caldwell have appealed from a decision of a Chief Hearing Examiner, dated July 2, 1964, which declared their Yellow Giant Nos. 1 through 6 Placer Mining Claims null and void for lack of a discovery of valuable mineral deposits on any of the claims. They appealed only as to the Yellow Giant Nos. 1, 2 and 3. [1]

The group of six claims lies on the south slope of Alvord Mountain in the Mojave Desert. Washes from the mountain contain recent alluvium of sand and gravel. One of the washes runs through the claims. On Claims Nos. 1, 2, 3, and 4 the wash is relatively narrow and well defined, but from Claim No. 4 through Claims Nos. 5 and 6 the wash flattens out into the desert topography and the sedimentary deposition broadens and deepens. About 700 yards up the wash north of Claim No. 1 there is a large gold quartz vein on which a substantial mining operation was conducted for 65 years ending in 1952. Over a period of years, tailings from the dump of that lode mining operation were washed down to these claims and any vein material that may have eroded would have gone down the wash to or through these claims.

A mining engineer for the Government testified that the wash from the north end of Claim No. 1 to Claim No. 4 is approximately 2400 feet long, 10 feet wide, and has an average depth of 2 feet of placer material. He estimated that there were 2700 tons of mineable material in the wash at a value of $1.85 a ton or $4,995.

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[1] The appellants indicated that the other claims in this contest would not be appealed but have been relocated in view of a major discovery as a result of recent development work. Thus, the Hearing Examiner's decision has become final as to Claims Nos. 4, 5, and 6.

As to the quantity of mineable material available, Mr. Caldwell testified, according to the transcript, that the wash that cuts from Claim No. 1 completely through Claim No. 6 averages four feet in width and broadens considerably on Claim No. 6 where it dumps into the alluvial fans, and he estimated 150,000 tons of material blocked out on the six claims (Tr. 77 and 78). The Hearing Examiner in his decision mentioned this testimony by Mr. Caldwell, as it was given in the transcript, and concluded that the evidence at the hearing clearly established that the quantity of material on the upper claims 2/ alone was insufficient to support a mining operation and that on the lower claims the question was whether the quality was sufficient.

The appellants in their appeal contend, in substance, that Mr. Caldwell's testimony to the effect that the wash is only four feet wide on the upper claims, as stated, is an error in the transcript; that he actually stated at the hearing that the blocked out pay material averages 40 feet in width throughout the approximate one mile length of the wash; that the 2700 tons of mineable material estimated by the Government witness is false; that the wash averages 40 feet in width through Claims Nos. 1, 2 and 3 with a depth of 4 to 6 feet; that the walls of the wash are also mineable pay material; that the length of the wash through Claims Nos. 1, 2 and 3 is over 2,000 feet and that by conservative estimate contains over 50,000 tons of mineable material, with a value that averages over $2 per ton. They also contend that the Government's witness is not a mining engineer as he has never done any mining and his opinions and calculations are therefore not expert.

Review of the case record as presented and of the Hearing Examiner's decision reveals that the pertinent evidence is adequately summarized in the decision and that the Examiner correctly declared the claims to be null and void.

The Department's Appeals Procedures provide that where a hearing has been held in a contest the record made at the hearing shall be the sole basis for decision on an appeal. 43 CFR § 1840.0-8. Evidence submitted outside a hearing cannot be considered in deciding the case on the merits but can be considered to determine whether or not a further hearing is warranted. See United States v. Gilbert C. Wedertz, 71 I.D. 368 (1964). The appellant's contention that Mr. Caldwell's testimony as to the amount of mineable material was erroneously reported in the transcript may be considered as tantamount to unverified, ex parte evidence submitted outside of the hearing.

2/ Yellow Giant Nos. 1, 2 and 3 Claims.

Thus, if we felt that this evidence, if proven to be true, may have a bearing in arriving at a different decision in the case, our only alternative would be to remand the case to the Hearing Examiner for further proceedings involving both parties to the case.

However, even if it were conceded that there are 50,000 tons of mineable material on the three claims, it does not appear that this factor would have an appreciable bearing on the appellants' case, in that a decision can be reached on the merits of the case on this appeal on the basis of the other, substantial evidence in the record.

In determining whether a valuable mineral deposit has been discovered, the Department has long used the prudent man test set out in Castle v. Womble, 19 L.D. 455 (1894), approved by the Supreme Court in Chrisman v. Miller, 197 U. S. 313 (1905) and recently reaffirmed by that Court in Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963).

In a contest against a mining claim, the Government has the burden of establishing a prima facie case against the validity of the claim and the burden then shifts to the claimant to prove validity of the claim by a preponderance of the evidence. United States v. Jesse Edwards, A-28145 (January 20, 1960); United States v. Robert Hight et al., A-30256 (April 21, 1965); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

The Department has held that there is a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. It is only when the exploratory work shows that minerals exist in such quantities and in such values that there is a reasonable prospect of success in developing a paying mine that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. United States v. John L. Cooper et al., A-30267 (May 11, 1965); United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961).

Evidence in the record, which is pertinent to the three claims involved in this appeal, is summarized as follows: The Government engineer took several samples from the claims, which assayed an average value in gold of $1.85 per ton, thus, a total of $4,995 for the 2700 tons of mineable material he estimated to be on the claims. As for costs of mining the property, he estimated a total capital outlay of $50,000 before the start of mining, including $10,000 for drilling, casing and a pump for a well, $25,000 for installing a cyanidation plant to recover the gold, $5,000 for loading and transporting equipment, $5,000 for a power plant to run the mill and another $5,000 for miscellaneous expenses for buildings, tools, tanks and gas tanks. This would make a capital outlay of over $15 a ton. He estimated labor costs to operate the property of $100 a day or $2 a ton, not counting the maintenance of equipment. Further, he testified as to a cyanidation test he had run on a composite of samples which showed an approximate 70 percent recovery, which would bring the $1.85 value down to about $1.30 per ton (Tr. 25, Contestant's Exhibit No. 13). He expressed opinions that the lands are nonmineral in character and that a prudent man would not be justified in spending further money and time with a reasonable expectation of paying to mine. (Tr. 25).

Mr. Caldwell testified to taking four samples of about 10 pounds each which were quartered down to about 1 pound each. The samples were screened through a 14-mesh screen and assayed at relatively high values (Tr. 41 to 44 and Contestee's Exhibits D, E, F and G). However, on rebuttal the Government's witness testified that this is not the normal method of taking and assaying samples and that the concentration ratio from his mesh screen would be 3.3 to 1 and his assays should be divided by 3.3 (Tr. 100 and 101). Thus, after adjusting the values, the gold values were comparable to the Government's samples. In addition to the above mentioned samples, Mr. Caldwell also had portions of the Government's samples assayed for silver as well as gold, with the permission of the Government's engineer (Tr. 45 and 46). These samples (Contestees' Exhibits Nos. I-1 through I-6) all showed gold values comparable to the Government's samples, with additional silver values for a total average value in gold and silver of $2.10 per ton.

If we were to assume that there are 50,000 tons of mineable material on the three claims as the appellants now contend, at an average value of $2.10 per ton, with an estimated capital expenditure of $50,000 and estimated operating costs of $2 per ton, the expenses of mining the material would far exceed the recovery. Therefore, we feel that the Government has established a prima facie case as to the invalidity of the claims, even with the assumption stated.

Mr. Caldwell testified that he plans to use an amalgamation and cyanidation process to process the material. He estimated a total cost of 65 cents a ton for processing and recovering the metal. He introduced in evidence Exhibit N-1, which is a letter from the Denver Equipment Company furnishing him cost information on the cyanidation process. The letter stated that there are so few cyanide plants operating that it was difficult to outline present day operating costs. However, the Company furnished a tabulation taken from the 1962 issue of the Mines Magazine which showed costs from past operating plants projected up to 1960 on the basis of cost of living index increases, which was merely theoretical. The figures showed the per-ton a day costs for the period from 1929 to 1938 for various operations varying from 4,000 tons a day to 60 tons a day, with projected 1960 costs ranging from $0.87 a ton for the 4,000-ton operation to $5.62 a ton for the 60-ton operation, and a cost of $1.30 a ton for a 100-ton a day operation. The letter also stated that the larger the plant, the lower the per ton milling cost. He also introduced in evidence Exhibit No. N-2, which is a bulletin of the Denver Equipment Company describing the cyanidation of gold ores.

On cross-examination, Mr. Caldwell stated that it is the practice of the Denver Equipment Company and other suppliers of mining equipment to sell the mine owner the complete cyanide system, and very often this is not necessary (Tr. 63), that the bulletin (Exhibit N-2) simply describes the general method and that he had adapted a flow sheet which was strictly his idea of a recovery method for the Yellow Giant Claims (Tr. 64). Further, on cross-examination, he testified that he could obtain some used equipment for erecting the plant and setting up mining operations, that with the help of his son he felt he could do most of the work of constructing some of the equipment himself, such as tanks and some equipment he can obtain on a lease basis (Tr. 66 - 69). In response to a question of the cost of setting up a plant, he stated that he "had hoped, and I think it still can be done, including everything for about $12,000, enough to at least get into the business, and as the profits come off and the system could be improved and additional things could be done." (Tr. 76, 77). His plans appear to be mostly theoretical and based on hopes and guesses.

His testimony pertaining to obtaining a water supply for the operation and the cost of doing so was very indecisive. He mentioned four possibilities of obtaining water: leasing a well near his claims, drilling his own well, pipe water from a source five miles away, or dam one of the washes and impound water from the rainstorms. He was not definite on any of these and had no idea what the cost would be to obtain water. On rebuttal, the Government engineer testified that an earthen dam would not be feasible under the desert conditions because it would not hold under the torrential rainstorms that occur (Tr. 98), and that the existing well, which Mr. Caldwell indicated that he might be able to lease, had been reported to him by a reliable source as sanded and could not be used even if they so desired (Tr. 111). We can only conclude from the evidence that any of the possibilities mentioned by Mr. Caldwell for obtaining a water supply in the area would involve considerable expense.

The Government engineer theorized that the gold and silver values found on the claims are as a result of tailings washed down from the tailings dump from Alvord Lode Mine located above the claims and thus, the values are on the surface. Mr. Caldwell contended the enrichment is from the erosion of the vein on the Alvord mine and greater values at depth could be expected. As pointed out by the Hearing Examiner in his decision, either theory can be correct or both can be partially correct.

From all of the evidence, we conclude that the values found and the amount of mineable material in Claims Nos. 1, 2 and 3 are not sufficient to warrant a person of ordinary prudence in further expenditure of his labor and means in the reasonable expectation of developing a valuable mine, in view of the large capital investment and operating costs which would be required, even if it were conceded that there are 50,000 tons of mineable material on the claims.

The appellants' contention that the Government witness is not a mining engineer and his opinions and qualifications are therefore not expert is not borne out by the facts in the record. The record shows that he majored in geology, and had been employed for about 13 years as a Geologist, Geological Engineer and a Valuation Engineer (Mining) during all of which time he was engaged in the field of mining. His qualifications were thus established to give expert testimony and opinions and his qualifications were not refuted by the appellants at the hearing.

We, therefore, hold that the appellants have failed to overcome the Government's prima facie case by a preponderance of the evidence and to sustain the validity of their claims.

Accordingly, the Hearing Examiner's decision of July 2, 1964, declaring the claims null and void because there had not been a discovery is affirmed.

Mr. Ray Sparks Caldwell and Mrs. Esther Clark Caldwell are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision the total filing fee is $15. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

If an appeal is filed, the adverse party to be served is:

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Enclosures

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Adm. Asst., Hearings
OPD
Gower Federal Service
Appeals List No. 1
PLS

appeal to Sec
affirmed A-30626
12-15-66

DOCKET FILES

Mining Claims: Discovery 3413

In a contest challenging the validity of a mining claim for lack of a discovery of a valuable mineral deposit, the mining claimant must sustain the validity of the claim by showing a discovery of valuable mineral which is sufficient to justify a person of ordinary prudence in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine.

United States v. O. Kenneth Smith et al., Contest No. 076384-C-3 (Sacramento) (March 24, 1966)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 MAR 31 PM 2 37

In reply refer to
704
Contest No. 076384-[illegible]-3
(Sacramento)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

March 24, 1966

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States : Red Hill Extension placer mining
v. : claim situated in the SE¼ sec. 19
O. Kenneth Smith : and SW¼ sec. 20, T. 23 N., R. 4
J. W. Luce : E., M.D.M., Butte County, Californi

Decision Affirmed

Mr. O. Kenneth Smith has appealed from a decision of a Hearing Examiner, dated March 4, 1965, declaring the Red Hill Extension placer mining claim null and void for lack of a discovery of a valuable mineral deposit.

The complaint initiating the contest proceedings against the mining claim charged that the existence of a deposit of valuable mineral of sufficient quantity to constitute a valid discovery is not disclosed within the boundaries of the mining claim. Mr. Smith filed an answer to the complaint that a hearing was held on December 2, 1964. Mr. Smith appeared without counsel.

The mining claim was located on July 1, 1937, on the west branch of the Feather River at its confluence with Empire Creek. The mineral referred to is gold. The general geology is large, massive serpentine. The working on the claim is a 270 foot cut across the southern boundary of the claim. The cut exposes 6 feet of clay-like loam.

The testimony and evidence adduced at the hearing is adequately summarized by the the Hearing Examiner and need not be repeated here.

On appeal it is contended that claims in the vicinity of the Red Hill Extension have been noted for production of large coarse gold only. It is asserted that mining engineers unfamiliar with the geology of the area would have difficulty in ascertaining the true value of a deposit. The appellant further contends that the claim had a valid discovery on the date of location and that the laws subsequent thereto are not to be applied retroactively although he makes no reference to any particular law.

The answer to the appellant's first contention is that the showing of isolated bits of material, not connected with or leading to substantial values, is not sufficent to constitute a discovery. United States v. Frank J. Miller, 59 I.D. 446 (1947). Nor may a discovery be based upon a geologic inference, since geologic inference, no matter how strong, cannot be accepted as a substitute for a discovery of a valuable mineral deposit within the limits of each claim. Thus, a claim of mineralization on nearby mining claims cannot serve to establish a discovery. Mere willingness to continue exploration is not a justification for a finding that a discovery has occurred. United States v. Melvin L. Nevitt, A-30030 (July 28, 1964).

The purpose of a hearing is to afford a mining claimant an opportunity to present evidence to establish that he has made a discovery of valuable minerals sufficient to validate his claim, and to cross-examine the witnesses of the contestant. The contestant has the burden of making a prima facie case on the charges asserted in the complaint, and then the burden of proof shifts to the mining claimant to show that he has made a discovery. Foster v. Seaton, 271 F. 2d 836 (1959). The appellant at the hearing did not challenge the method of sampling used by the Government's mineral examiner in testing his claim. Nor did he produce any evidence tending to show how the true value of a deposit within the area of his claim is ascertained and in what manner the method of sampling by the Government's witness was incorrect. The appellant at the hearing tendered only a written statement. The pertinent portions thereof relate to the amounts expended for assessment work, the use of the claim for mining purposes, and his intent to continue further exploration. None of these establishes that a discovery of valuable mineral under the prudent man rule has been made within the limits of the claim.

In regard to the last contention, the mining law to which the Hearing Examiner referred is the Mining Law of May 10, 1872. The decision indicated that provisions of that law can be found in sections 22 and 35 of the 1958 edition of Title 30 of the United States Code. The prudent man test referred to by the Hearing Examiner was laid down in 1894 by the Department in Castle v. Womble, 19 L.D. 455, 457, and has been adhered to by the courts and the Department in the cases cited by the Examiner. Moreover, the testimony of the Government's mineral examiner related to what was exposed on the claim prior and subsequent to the issuance of the contest complaint. The validity of a mining claim must be supported by a current showing of a valuable mineral deposit. Cf. United States v. LaFortuna Uranium Mines, Inc. A-29852 (May 4, 1964).

Since the contestant established a prima facie case of no discovery which has not been refuted by the contestee, the Hearing Examiner properly declared the Red Hill Extension placer null and void.

The record shows that after diligent search J. W. Luce, an original locator, was reported deceased. Service of notice of contest was had by publication addressed to J. W. Luce, his heirs, personal or legal representative, or assigns. As no answer was filed within thirty days after the fifth publication, the allegations stated in the published notice are taken as confessed and the claim as to the Luce interest is also declared null and void.

Accordingly, the decision of the Hearing Examiner is affirmed.

Mr. Smith is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

In the event an appeal is taken the adverse party to be served is:

Office of the Regional Solicitor
U. S. Department of the Interior
P. O. Box 21-5427
Sacramento, California 95821

James F. Doyle
Chief, Office of Appeals
and Hearings

Enclosure

DISTRIBUTION:
Mr. O. Kenneth Smith (Certified Mail)
Office of the Regional Solicitor, U. S. Department of the Interior
Hearing Examiner Rudolph M. Steiner (Sacramento)
Administrative Assistant Hearings
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
WHW

Appeal to Sec
Reversed & Remanded
7-27-66

A-30634
7-24-68

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.

IN REPLY REFER TO:
704
Sacramento 080166

Mining Claim
Validity Determination

BUREAU OF LAND MANAGEMENT
SACRAMENTO
1966 APR 11 AM 10 00

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

APR - 6 1966

DECISION

Dorothy L. Benton :

: January 19, 1966 Appeal from Decision of

: February 25, 1966 Notice of Appeal Filed

Appeal Dismissed

For the reason listed below your appeal to the Director, Bureau of Land Management, is hereby summarily dismissed (43 CFR 1840.0-7):

☐ No statement of reasons has been filed in support of the appeal, and the time for filing the statement has expired (43 CFR 1842.5-1).

X ☐ ~~Your statement of reasons for your appeal~~ (or your request for extension of time to file a statement of reasons) ~~was filed in this~~ office, but it was filed late. (43 CFR 1842.5-1) ~~The statement of reasons was transmitted to this office after expiration of the period~~ allowed and the delay in filing cannot be waived. (43 CFR 1840.0-6(b)) The above appeal which was received is postmarked March 31, 1966.

☐ You have not served the adverse party named in the decision appealed from with a copy of ☐ the notice of appeal, and/or ☐ the statement of reasons for the appeal, in the manner prescribed in 43 CFR 1840.0-6(e). (43 CFR 1842.5-2)

☐ Your appeal does not point out wherein the decision appealed from is believed to be in error and consequently you have failed to state reasons for the appeal, as required by the appeals procedures. See Duncan Miller, 65 I.D. 290.

The dismissal of an appeal for failure to comply with the above requirements is mandatory. We have enclosed Circular 2137 which contains the cited regulations.

You are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in enclosed Form 1844-1 and Circular 2137. 1/ If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. In taking an appeal there must be strict compliance with the regulations. If you do not appeal we will close the case and return the record to our State Director for further action. If an appeal is taken herefrom the filing fee will be $5 for each claim included in the appeal, $10 if the two claims here concerned are included in the appeal.

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

1/ The adverse party to be served is: None

cc:
SD (California)

appeal to Sec.

Set Aside + Remanded
A-30636
7-24-68

DOCKET FILES

Mining Claims: Common Varieties of Minerals 3511

Volcanic stone suitable for crushing for use as roofing granules, occurring in pleasing and unusual colors and possessing other physical and chemical characteristics which makes it more desirable for use as roofing granules over many other deposits of stone in the general area, but used only for the same purpose as other widely available, but less desirable deposits of stone, is a common variety of stone and not locatable under the mining laws since these facts do not give the deposit a special, distinct value.

United States v. R. W. Brubaker et al., Mineral Contests Riverside Nos. 02776, 02777 and 02778 (April 11, 1966)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1966 APR 20 PM 2 39 ③

In reply refer to:
704
Mineral Contests
Riverside Nos. 02776,
02777 and 02778

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

April 11, 1966

Certified Mail
Return Receipt Requested

DECISION

United States of America,
Contestant

v.

R. W. Brubaker (also known as Ronald W. Brubaker); B. A. Brubaker (also known as Barbara A. Brubaker); and William J. Mann (also known as W. J. Mann),
Contestees

Contest No. 02776 involving the Goldview placer mining claim 1/ located in the N½N½ Sec. 12, T. 9 N., R. 1 W., recorded in Vol. 427, pages 227 and 571; the Nebocher placer mining claim 1/ covering the N½NE¼NW¼ Sec. 12, T. 9 N., R. 1 W., S.B.M., recorded in Book 445, page 232;

Contest No. 02777 involving the Near Pink placer mining claim covering the S½SW¼SW¼ Sec. 28, T. 10 N., R. 1 W., S.B.M., recorded in Vol. 387, page 309; and

Contest No. 02778 involving the Near Pink No. 2 placer mining claim 1/ covering the N½SW¼SW¼ Sec. 28, T. 10 N., R. 1 W., S.B.M., recorded in Vol. 418, page 95; Orchid Slope No. 1 placer mining claim in the NE¼NW¼ Sec. 8, T. 9 N., R. 1 E., S.B.M., recorded in Vol. 427, pages 228 and 569; and Calico Shores placer mining claim covering the S½SE¼NW¼ Sec. 30, T. 10 N., R. 1 E., S.B.M., recorded in Vol. 434, page 422; all claims being recorded in the San Bernardino County, California, mining records.

Decision Affirmed

1/ The Examiner's decision stated that at a prehearing conference prior to the taking of testimony, the parties stipulated and agreed that Contest No. 02776 shall be amended to include the Nebocher placer mining claim situated in the N½NE¼NW¼ Sec. 12, T. 9 N., R. 1 W., S.B.M., recorded in Book 445, page 232, San Bernardino County mining records; that the Goldview placer mining claim in Contest No. 02776 shall be considered abandoned as to this contest and no evidence shall be presented; and that the contestees' desire to present no evidence regarding the Near Pink No. 2 placer mining claim in Contest No. 02778.

The above-named contestees have appealed from a Hearing Examiner's decision, dated July 10, 1964, which declared their Nebocher, Near Pink, Orchid Slope No. 1 and Calico Shores placer mining claims null and void ab initio because the claims were all located subsequent to July 23, 1955 for a common variety material. His decision held that the material upon each of the claims is a common variety as defined by administrative and court decisions, namely, a deposit which may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, but which does not possess a distinct special economic value for use over and above the normal uses of the general run of such material. He also stated that the contestees may acquire any material needed for their operation under the present regulations (43 CFR Part 3610) for disposal of mineral materials under the Act of July 31, 1947, as amended by the acts of July 23, 1955 and September 25, 1962 (30 U.S.C. §601 et seq.).

The claims were located for volcanic rock after enactment of the Act of July 23, 1955 (69 Stat. 367), which removed common varieties of sand, stone, gravel, etc. from the operation of the mining laws and made them subject to disposal by sale under the materials disposal act of 1947, supra. The materials on the four claims are crushed and sold for use primarily as roofing granules.

The Hearing Examiner thoroughly summarized the testimony and other evidence adduced at the hearing in his decision. Therefore it is necessary only to refer to the substance of that evidence in this decision.

A mining engineer testified for the Government. One of the contestees, Ronald Brubaker, who is a graduate in geological engineering, and two consulting geologists, testified in behalf of the contestees. The claims are located near the City of Barstow, in southern California. Each of the four claims contains a deposit of volcanic material of a different color, and all four colors are popular for use as roofing granules. Volcanic rocks occur very commonly throughout the desert area in the southwest and in the Barstow area and in a wide range of colors. The Government witness testified that there are many commonly occurring materials used for roofing granules and that he does not believe the material on these claims has a special or distinct value over other material used for roofing granules in the area. The contestees' witnesses testified as to the numerous qualities of the stone deposits on these claims, which make them more desirable for roofing granules over other deposits in the general area, such as the pleasing and unusual colors, hardness and density, chemical resistance to weathering, susceptibility of the stone to crushing into equal fragments resulting in economy of crushing operations, the porosity of the material which causes it to adhere better to roofing materials, and the fact that the stone, when crushed and applied, does not lose its color due to weathering as do many roofing granules. There is no doubt from the testimony given by the witnesses for the contestees that the materials on the four claims have all of the characteristics mentioned and that the materials make very good roofing granules, probably surpassing many other deposits in the general area.

Appellants give the following reasons for appeal:

(1) The Hearing Examiner erred in holding that the rock on the claims has no special distinct economic value since the evidence was overwhelming that the stone does have special physical and chemical properties which give it a distinct economic value, and

(2) The Hearing Examiner, obsessed with the idea that the contestees could buy this material from the government, loses sight of the fact that they have to bid for it, that if they spend large sums of money programming and developing a particular color, advertising it, furnishing samples and building up a demand for it, they are constantly harrassed with some competitor outbidding them for the source of their raw materials.

Common varieties are defined in 43 CFR § 3511.1(b), in part, as follows: "'Common varieties' includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. . . ." (underscoring added).

Conceding that the materials on the claims have the special physical and chemical properties which the contestees have claimed, we agree with the Examiner that the materials are common varieties because they do not possess a distinct special economic value for use over and above the normal uses of the general run of such material.

In United States v. D. G. Ligier et al., A-29011 (October 8, 1962), it was held: (Syllabus): "Building stone suitable for construction purposes which is found in an extensive range of pleasing colors, has high compressive strength and light weight, but can be used only for the same purposes as other widely available but probably less desirable deposits of the same material, is a common variety of building stone and not locatable under the mining laws since its special characteristics do not give it a special, distinct value." (underscoring added).

Also in United States v. J. R. Henderson, 68 I.D. 26, 29 (1961), the Department said: "The fact that these sand and gravel deposits may have characteristics superior to those of other sand and gravel deposits does not make them an uncommon variety of sand and gravel so long as they are used only for the same purposes as other deposits which are widely and readily available." (underscoring added).

For the reasons given, the Hearing Examiner's decision is hereby affirmed.

The Materials Disposal Act of 1947 is the only method by which common variety mineral materials may be obtained since enactment of the Act of July 23, 1955, supra.

The contestees are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO-1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all four adversely affected by this decision the total filing fee is $20. In taking an appeal there must be strict compliance with the regulations.

If an appeal is filed, the adverse party to be served is:

Regional Solicitor
U. S. Department of the Interior
7759 Federal Building
300 N. Los Angeles Street
Los Angeles, California 90012

James F Doyle
Chief, Office of Appeals
and Hearings

Enclosures

DISTRIBUTION
Mr. T. L. DeBord, Attorney for Contestees (Certified Mail)
Regional Solicitor, U. S. Department of the Interior, Los Angeles
R. W. Brubaker
B. A. Brubaker
William J. Mann
Office of Hearing Examiners, Sacramento, California
Div. of L&M S&T (4)
Div. of L&M PM (2)
Adm. Asst., Hearings
OPD
Gower Federal Service
Appeals List No. 1
PLS

DOCKET FILES

Mining Claims: Determination of Validity 3400.1

Marketability of widespread nonmetallic minerals is not the sole test of the validity of a claim of this nature; where the sale of such material is for limited uses, and where only a small amount of the material is sold, and no persuasive showing is made that a profit is realized from the sales, the claim is invalid for lack of discovery.

Labor costs are properly a factor to be considered in determining whether a discovery has been made pursuant to the "prudent man rule." Other costs to be considered in determining whether a profit was realized include expenses for acquiring and replacing equipment, road building, fences constructed, dynamite and other supplies, and all other expenses for developing and maintaining the claim, and extracting, processing, transporting and selling the material.

Claims located for common varieties of sand, stone and gravel prior to July 23, 1955, are valid only if the requirements of the mining laws including discovery have been met prior to that date.

United States of America v. *J. G. Norman Cartier et al.*, Los Angeles Contest No. 0164487 (April 18, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
(3)
1966 MAY 6 AM 10 00

In reply refer to:
704
Los Angeles Contest No.
0164487
Los Angeles 0164487
(now Riverside)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

April 18, 1966

Certified Mail
Return Receipt Requested

DECISION

United States of America, :
Contestant,
:
v.
:
J. G. Norman Cartier,
Elizabeth N. Cartier and :
Marilyn G. Cartier Kissee,
Contestees-Appellants. :

Rockland No. 5 Placer mining claim located in sec. 36, T. 6 S., R. 2 E., S.B.M., California, within the San Bernardino National Forest.

Decision Affirmed

The above-named appellants have appealed from the Chief Hearing Examiner's decision dated June 8, 1964, determining the above-identified mining claim to be null and void for lack of a showing of a valid discovery of a locatable mineral within the purview of the mining laws, and rejecting the appellants' mineral patent application (Los Angeles 0164487) for the claim.

The appellants' mineral patent application shows that the mining claim was located as an association placer mining claim on November 28, 1953 (see also Tr. 95, 96), asserting a discovery of building stones within the boundaries of the claim. The patent application contains an allegation that the large stones (cobblestones) are in demand for such uses as rock gardens, and the small, irregular-shaped stones are crushed into aggregate for concrete by the applicants' gasoline engine powered stone crusher. At the request of the Regional Forester (San Francisco), Forest Service, United States Department of Agriculture, a contest complaint was issued against the claim charging, in part germane to the appeal, that there has been no discovery of a valuable locatable mineral deposit within the meaning of the mining laws. An answer was filed by Mr. Cartier on behalf of all of the appellants in which the charge was denied.

A hearing was held before the Chief Hearing Examiner on February 26, 1964. The Government was represented by the office of the Acting Regional Attorney, Office of the General Counsel, United States Department of Agriculture. Mr. Cartier appeared personally at the hearing, and all of the mining claimant-patent applicants were represented by counsel. Pursuant to motion made by them at the hearing (Tr. 155, 157), the mining claimants filed for consideration as part of the contest record certain written interrogatories and the answers of a proposed witness who could not attend the hearing.

The appellants' counsel on appeal contends, in substance, that the evidence adduced at the hearing does not support the Chief Hearing Examiner's finding that the mining claimants failed to establish a valid discovery on the claim prior to July 23, 1955.

The contest record as compiled at the hearing and by the submitted written interrogatories has been carefully reviewed.

At the hearing the contestees' then attorney stated that the mineral value of the mining claim consisted of building stone or dimension stone of the nature used in ornamental or in the building trades (Tr. 5). Such material includes crushed stone to be used as aggregate in cement (Tr. 66, 108; Interrog.) or for other construction purposes.

A mining engineer employed by the Forest Service testified that the rock material was common to any area in Southern California where the bedrock or products of erosion were granitic batholith and he observed nothing singular in the shapes of the rocks as compared to other drainages that penetrate granitic terrain (Tr. 43-44). The witness was of the opinion that the rocks could only compete in the market in the thinly populated area of Anza because material that can be marketed at a lower cost is available nearer the heavier populated areas (Tr. 29-32, 44), and that another mine has more accessible material to supply the Anza market (Tr. 45). He testified that samples of the material on the claim are shown by assay reports (Exhs. 8 and 9) to be ordinary granitic rock which is common in drainages in Southern California (Tr. 43). Although no tests were made of the hardness of the material (Tr. 67), the mining engineer testified that the material on the claim is not as hard and substantial as material that can be obtained closer to areas of greater population (Tr. 39), and he is of the opinion that aggregate from such material would not meet the specifications for high standard concrete (Tr. 66), and that concrete using such material would not meet the requirements for use in highway construction (Tr. 89). The witness stated that a substantial part of the sand exposed on the claim is dirtied by considerable organic material content (Tr. 14). There is no outcrop of bedrock exposed on the claim (Tr. 14). Mr. Cartier showed the witness various structures containing materials from the claim or his other similar claims in the area (Tr. 26, 68).

A mechanical engineer testifying for the mining claimants agreed that crushed rock from the mining claim is a usable product, but not as good as similar material now produced in the Anza area (Tr. 84).

Mr. Cartier testified that he owns six mining claims adjoining or adjacent to the mining claim in issue embracing a total of 350 acres, and all of the claims were located for approximately the same materials (Tr. 122, 123). The mining claimant testified that he gathered the rocks by hand (Tr. 142). At first he gathered cobblestones and he had cement jobs requiring rock for which he charged by the hour rather than for the material, only by gathering his own material he worked more hours (Tr. 118). In 1954, he acquired a portable rock crusher which he keeps mostly on another mining claim, but approximately 70% of the material crushed he estimates comes from the Rockland No. 5 claim (Tr. 125, 141). The witness is uncertain as to which mining claim the material came from to supply his various sales, and must estimate the percentage of material sold that he obtained from the Rockland No. 5 claim, since most of his sales of material concerned weekend jobs and he has no accurate records concerning them or where the material came from (Tr. 136, 139). The material for crushing was removed from the claims to the rock crusher for processing (Tr. 141). Mr. Cartier's evidence shows that from all seven mining claims, and not just the claim in issue, he sold 25 tons of cobblestone in 1953, 26 tons of cobblestone and 12 tons of crushed rock in 1954, and 35 tons of crushed stone in the first half of 1955 (Exh. 10; Tr. 139). 1/ With his present equipment it takes Mr. Cartier all day to prepare five tons of crushed rock (Tr. 148). He testified that if five tons of such material are sold for $25, his expenses for gasoline and oil would amount to $10, and from the remaining $15 he must obtain his own salary or profit (Tr. 149). The $10 expense figure would not include expenses for acquiring and replacing equipment, road building, labor developing the claim, fences constructed, dynamite and other supplies, and all other expenses. The witness testified that the surface rocks are becoming more scarce and he is starting to excavate (Tr. 142), and it gets more expensive as the excavating goes deeper (Tr. 145).

The deponent who answered the interrogatories after the hearing is an attorney and mining engineer who is of the opinion that the cobblestones and boulders are a surface veneer, but in his opinion there is sufficient material to supply a crushing operation of from 100 to 500 tons a month for considerable time. The answers show, in substance, that the deponent is of the opinion that the materials have a commercial use for certain purposes, and that a profit would result by the expenditure of greater time, money and labor on the claims.

Section 3 of the act of July 23, 1955, as amended, (30 U.S.C. § 611 (1964)), provides, in pertinent part, that no deposit of common varieties of sand, stone, or gravel shall be deemed a valuable mineral deposit within the meaning

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1/ In 1962, Mr. Cartier testified, he had nine sales totaling $550; four of the sales were for cobblestones and the other five sales were for crushed rock (Tr. 137). In 1963 he made seven sales of materials from the seven claims totaling $270 (Tr. 134). In 1964 up to the time of the hearing he has sold ten tons of material (Tr. 134). The foregoing are typical of his sales from the seven claims each year (Tr. 138). The mining claimant testified that, although there is no binding agreement, if he could expand his operations a retailer in Anza has expressed interest in buying 200 tons of crushed rock a month (Tr. 131).

of the mining laws of the United States so as to give effective validity to any mining claim located under such mining laws after the effective date of that act. The Department has explained what constitutes "common varieties" within the purview of the act in 43 CFR 3511.1(b).

At the hearing the mining claimants' attorney agreed that the materials exposed on the mining claim would be common varieties in many areas, but asserts that the materials are needed in the Anza area and can only be obtained without a long haul from one of the seven mining claims owned by Mr. Cartier _et al._, and he alleges that this is an economic factor causing the material to be unique in that area and excluded from the "common varieties" category.

Stone, gravel or sand suitable for construction purposes, free from deleterious substances and having proportions which meet construction specifications without expensive processing, but used only for the same purposes as other widely available, but less desirable deposits of stone, gravel or sand, are common varieties of stone, gravel and sand and are not locatable under the mining laws since these facts do not give the material a special distinct value. _United States_ v. _J. R. Henderson_, 68 I.D. 26 (1961). And building stone suitable for construction purposes which is found in pleasing colors and which can be shaped readily, but which can only be used for the same purposes as other available building stone is common variety stone and not locatable. _United States_ v. _Kenneth McClarty_, 71 I.D. 331 (1964). Moreover, the mining claimants' alleged system of attempting to avoid competition by locating on all sources of these common varieties materials they know about in the area (Tr. 147) cannot change common varieties material to locatable material. The evidence offered at the hearing supports the Chief Hearing Examiner's finding that the sand and stone exposed on the mining claim are common varieties and excluded from location after the enactment date of the act of July 23, 1955, _supra_, and the appellants have offered nothing on appeal to show that this finding is erroneous or to warrant changing the finding.

The Department has often fully discussed the application of the mining laws to deposits of sand, stone, and gravel. See the many cases cited in _Abe Jaramillo_, A-28533 (February 6, 1961). As the decisions point out, section 3 of the act of July 23, 1955, _supra_, provides that deposits of common varieties of sand, stone, or gravel shall not be deemed to be valuable mineral deposits within the meaning of the mining laws so as to give effective validity to any mining claims thereafter located under such laws. Claims located for common varieties of sand, stone and gravel prior to July 23, 1955, are valid only if the requirements of the mining laws including discovery have been met prior to that date. Rev. Stat. § 2332 (1875) (30 U.S.C. § 22 (1964)) requires that the mineral deposit must be "valuable." As to minerals of limited occurrence, the Department, with judicial approval, has long adhered to the definition of value laid down in _Castle_ v. _Womble_, 19 L.D. 455, 457 (1894); _Best et al._ v. _Humboldt Placer Mining Co. et al._, 371 U.S. 334 (1963), that minerals must be found and the evidence be of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. With respect to widespread nonmetallic materials such as sand, stone and gravel, however, the Department has long prior to, and since, the act of July 23, 1955, supra, stressed the additional requirement of present marketability, so that to justify possession a mineral claimant must show that by reason of accessibility, bona fides in development, proximity to market, existence of a present demand, and other factors, the deposit is of such value that it can be mined, removed, processed, and disposed of at a profit. See Layman et al. v. Ellis, 52 L.D. 714 (1929); Opinion of the Acting Solicitor, 54 I.D. 294 (1933); Ickes v. Underwood et al., 141 F.2d 546 (1944); United States v. Strauss et al., 59 I.D. 129, 138 (1945); United States v. Loyd Ramstad et al., A-30351 (September 24, 1965).

Furthermore, the Department has long construed the mining laws as not validating a mineral location based upon a deposit of sand or stone merely because there is some market for it. Marketability of the stone is not the sole test of the validity of a claim of this nature, although the claim is invalid if there is no market for the deposit. By the enactment of the Materials Act of July 31, 1947, as amended (30 U.S.C. § 601 et seq. (1964); 43 CFR 3610.0-3), which authorizes the sale of certain materials on the public domain, and was acted upon on the basis of the Department's interpretation, Congress evidenced its acceptance of the prior position of the Department that all such deposits are not subject to location under the mining laws, even though the material can be used for some purposes and sold for such uses. Where the sale of material from a mining claim is for use as a binder or filler, and where the market for the material is limited to the near vicinity of the claim, and where only a small amount of the material is sold, and no persuasive showing is made that a profit is realized from the sales, the claim is invalid for lack of discovery. See United States v. Quentin L. Brewer et al., A-27908 (December 29, 1959) and the cases cited therein.

Mineral claimants can obtain patent only when the conditions on their claim satisfy the requirements of the mining laws. When the appellants applied for patent they voluntarily assumed the burden of showing that a valid discovery had been made. See United States v. Eric North, A-27936 (July 1, 1959). And since the mining claim in issue is located in a national forest, the claimants are required to establish the validity of their claim by clear and unequivocal evidence. See John L. Cooper et al., A-30267 (May 11, 1965) and the cases cited therein.

There was no evidence of substance offered at the hearing to support a finding that the sand on the claim had value. Cobblestones for such uses as rock gardens are not a valuable discovery of a mineral and such a claim is not subject to patent under the mining laws. Cf. United States v. Abe Jaramillo, supra. The evidence shows that only about 47 tons of crushed stone was removed from all seven of the Cartier-located claims prior to July 23, 1955, and there is mere speculation as to the amount of this material actually removed from the only mining claim in issue in these proceedings. Considering the vast quantity of such materials claimed available for crushed rock in the area and on the subject mining claim, the insignificant quantity sold before (and after) July 23, 1955 does not represent a bona fide commercial development.

In their appeal, the appellants contend that the evidence shows that during the period from November 1953 to July 1955, there were sales of material from the mining claim in issue and the other six claims totaling $675, and they estimate that 1,000 hours approximately was expended by Mr. Cartier as labor in removing and processing and selling this material. Labor costs are properly a factor to be considered in determining whether a discovery has been made pursuant to the "prudent man rule" explained heretofore. See United States v. Vernon O. and Ina C. White, A-30460 (December 3, 1965). Considering the expense of developing a claim, and extracting, processing and transporting the materials to market (including the mining claimant's own labor), the evidence referred to in the appeal shows a very marginal operation and it is doubtful that a net profit was realized on the complete operation. It must be understood that after the Government established a prima facie case of lack of a valid discovery (which was done by the testimony of the Forest Service's mining engineer), the mining claimants then had the burden of showing by a preponderance of the evidence, evidence of equal weight would not suffice, that their claim is valid. See United States v. J. S. Devenny, A-30031 (June 19, 1964). The fact that there was a very small market for the material prior to July 23, 1955, and no persuasive showing that a profit was realized from the sales, is insufficient evidence to show a valid discovery prior to the enactment of the act of July 23, 1955, supra, and after that date a discovery could not be made as the material was not locatable.

In their appeal the appellants stress the potential future sales of the material in the event the operations on the mining claims are expanded by acquiring machinery and giving up other employment to spend full time expanding the mining operations. The discovery, which means all of the elements of discovery as explained heretofore, must have been made on this claim for common varieties material prior to the enactment of the act of July 23, 1955. In Foster et al. v. Seaton, 271 F.2d 836 (1959), the Court held that to allow land containing widespread nonmetallic material such as sand, rock, and gravel deposits to be removed from the public domain because unforeseeable developments might some day make the deposits commercially feasible cannot implement the congressional purpose in encouraging mineral development. The fact that Mr. Cartier did not previously seek to expand the claim into the operation he now envisions is at least some indication that he did not believe there was such a present demand heretofore for the deposit on the claim. Cf. United States v. Fisher Contracting Company et al., A-28779 (August 21, 1962); United States v. Everett Foster et al., 65 I.D. 1, 7 (1958).

The appellants have not shown that the decision appealed from is erroneous, and their showing on appeal does not warrant changing the decision appealed from. For the reasons stated, the Chief Hearing Examiner's decision is affirmed.

Mr. J. G. Norman Cartier and the other appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form W01844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of showing wherein the decision appealed from is in error.

In the event an appeal is taken the attorney for the adverse party who must be served is:

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Frances A. Patton

Acting Chief, Office of Appeals
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Div. of L&M S&T (4)
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Administrative Assistant, Appeals & Hearings
OPD
Gower Federal Service
Appeals List No. 1
JHO'D

appeal to Sec
affirmed A30654
2-16-67

DOCKET FILES

Mining Claims: Discovery 3413

A mining claimant's mere feeling or belief that he can develop his claim into a paying proposition is insufficient to establish a discovery in the absence of a showing of a deposit of valuable mineral which would meet the prudent man test of Castle v. Womble.

The discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values.

It is the duty of a mining claimant whose claim is being contested by the Government to keep discovery points available for inspection by the Government mining engineers.

Appeals Procedure: New Evidence 1840

The record made in a contest shall be the sole basis for decision on an appeal, and evidence submitted outside a hearing in a contest case cannot be considered in deciding the case on the merits but can be considered to determine whether it affords a basis for ordering a further hearing in the case. A further hearing will not be ordered in the absence of a showing that it would be productive of significant facts pertinent to a decision on the merits.

United States v. Charles D. Haas and Jeanne D. Haas, Mineral Contest Sacramento 076812 (April 20, 1966)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 MAY 6 PM 2 49

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Mineral Contest No.
Sacramento 076812

April 20, 1966

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America,	:	Involving the Lost Vein lode
Contestant	:	mining claim located within
	:	Sec. 36, T. 23 S., R. 5 E.,
v.	:	M.D.M., Monterey County,
	:	California, within the Los
Charles D. Haas and	:	Padres National Forest.
Jeanne D. Haas,	:	
Contestees	:	

Decision Affirmed

Charles D. and Jeanne D. Haas have appealed from a Hearing Examiner's decision, dated July 31, 1964, which declared their Lost Vein lode mining claim null and void for failure to establish the validity of the claim at the hearing by proving the existence of a discovery of valuable minerals.

The claim is located in the Los Padres National Forest, and this proceeding was initiated upon the recommendation of the Forest Service, United States Department of Agriculture. The Hearing Examiner fully summarized the testimony and evidence presented at the Hearing and applied the ruling case law as developed by the Department and the Courts to the facts developed at the hearing. We have carefully reviewed the entire case record and are of the opinion that the Hearing Examiner's decision is correct.

For the purpose of this decision, we will briefly summarize the evidence adduced at the hearing and will mention portions of testimony and evidence which have bearing on contentions raised by the appellants.

The contestees stated that they were claiming manganese, gold and silver values. Two witnesses testified for the Government -- a mining engineer employed by the Forest Service and an associate Professor of Geology at San Jose State College. They examined the entire area of the claim as well as the surrounding area, observing the geology of the area, and familiarized themselves with the mining history of the area and mining costs. In areas pointed out by Mr. Haas as places he thought contained good values, they sampled. They took a total of seven channel samples and had them assayed by Abbot A. Hanks, Inc. of San Francisco. Three of the samples were taken by the geologist, with the help of the Forest Service mining engineer, and were assayed for gold, silver and manganese. These samples showed a trace of silver per ton, no gold and 0.12%, 0.68% and 0.79% manganese, respectively. Four samples were taken by the mining engineer, three of which assayed no gold or silver and 0.50%, 0.33% and 0.17% per ton in manganese, respectively, while one of the samples showed a trace of gold, a trace of silver and no manganese. The geologist submitted a composite of materials from all of the materials he had obtained for a spectographic analysis. This analysis ahowed numerous minerals, which ordinarily make up common rock. There was no concentration of any mineral of any significance. He testified that the manganese content on the claim is only slightly higher than the content of ordinary rock. The mining engineer stated that mining costs would be ten times greater than the recovery value, if the low grade mineral on the claim could be recovered, and that the requirement for commercial manganese today is 35% or better. They both expressed the opinion that an ordinary prudent man would not be justified in spending further time and money with a reasonable expectation of developing a paying mine. Contestant, therefore, established a *prima facie* case by showing that the contestees failed to meet the prudent man test set out in *Castle* v. *Womble*, 19 L.D. 455 (1894), which has been approved by the Supreme Court.

Charles D. Haas testified to taking samples from the claim and having them assayed for manganese, and gold and silver. The results are contained in Contestees' Exhibits A, B, C and D. The following were assayed by one Colin Donaldson, Assayer and Chemist:

Exhibit A, 21.1% manganese. This assay was for manganese only.

Exhibit B, for gold and silver only, shows the following results:

Sample No. 2 - 0.89 ounces per ton of silver and 0.03 ounces per ton of gold,

Sample No. 3 - 1.37 ounces per ton of silver and 0.02 ounces per ton of gold,

Sample No. 4 - 0.29 ounces per ton of silver and 0.02 ounces per ton of gold.

Exhibit C, 13.5% manganese. This assay was for manganese only.

Exhibit D was assayed for manganese only by Josiassen Smelting and Refining Company, Emeryville, California, and showed 0.24% manganese. On cross-examination Mr. Haas testified that the sample for Exhibit A consisted of three rocks about six inches in diameter; that the samples in Exhibits A and C were assayed for manganese only because it was manganese rock and it was not his intention to determine the gold and silver content; and that the samples in Exhibit B were assayed for gold and silver only and not for manganese because of the type of rock it was--it was crater rock. In answer to a question of the Hearing Examiner as to whether Mr. Colin Donaldson (who made the assays in Exhibits A, B and C) is registered as an assayer in the State of California, Mr. Haas stated that he was not sure that he is. He stated that Mr. Donaldson is a friend of his. Mr. Haas further testified that he had an offer from Kaiser Industries to buy manganese on the basis of the last assay, 21.1% manganese, but admitted that it was made over the telephone and there is no offer in writing. He further stated that it has been impossible to do anything since he purchased the claim in January 1963 because it is hard to get people to work in that area; and that he feels the property can be developed into a paying proposition.

The contestees' evidence falls far short of even meeting the prima facie case established by the Government, let alone the requirement that the mining claimants must establish the validity of their claims by a preponderance of the evidence after the Government has presented a prima facie case. Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959).

The following is quoted from the Hearing Examiner's decision:

> To overcome this evidence the contestee offered assay reports from a source other than a recognized chemical laboratory. [1] The one report submitted by him assayed by a recognized assayer [2] was in agreement with the assay reports from a recognized laboratory submitted by the contestant, and assayed only 0.24% manganese. The contestee offered nothing else to explain or substantiate the unusual values reported in his assay. In the circumstances no great reliance or credence can be placed upon this evidence.

There is nothing to show that the contestee used acceptable and standard sampling techniques and even if credence is given to the samples showing 21.1% and 13.5% manganese, this is far below the 35% or better required by industry as testified to by the Government's witnesses. The telephone offer allegedly made by Kaiser can be given no weight as it was not in writing and no evidence was presented as to the details. It was undoubtedly nothing more than a conditional offer, predicated upon the condition that the company would buy ore if he could deliver manganese ore of 21.1% or better, and the evidence in the record negates the possibility of his ability to do so.

---

[1] Refers to the assays made by Mr. Colin Donaldson.

[2] Refers to the assay report made by Josiassen Smelting and Refining Company.

Mr. Haas' mere feeling or belief that he can develop the claim into a paying proposition is insufficient to establish a discovery in the absence of a showing of a deposit of valuable mineral which would meet the prudent man test of Castle v. Womble, supra. The discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values. United States v. John L. Cooper et al., A-30267 (May 11, 1965). The mere willingness of mining claimants to expend further time and money in exploration is insufficient to establish the presence of a discovery. United States v. Robert Hight et al., A-30256 (April 21, 1965). The Department has long held that there is a distinct difference between exploration and discovery. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. See United States v. John L. Cooper et al., supra; United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961).

Shortly before the date on which the hearing was set, the contestees wrote the Hearing Examiner requesting a delay of one year in the hearing, pointing out adverse conditions which they had encountered, and stating that a delay would give them a reasonable time to further develop the claim and substantiate their contention that the claim contains sufficient quantities of valuable minerals to constitute a valid claim. They further stated that they believed that within the additional time, with their planned developments, assays will be substantially increased and "it is possible sufficient values may be discovered to operate at a profit if efficiently operated." Upon recommendation by counsel for the Forest Service, the Hearing Examiner denied the request for postponement because the claimants were in the process of building living quarters on the claim and it would be to the best interest of the claimants to have the validity of the claim determined before the expenditure of further monies for improvements. The hearing was held on the date as originally scheduled.

In their appeal the appellants allude to the Hearing Examiner's denial of their request for a postponement of the hearing. Their reasons were inadequate to justify a postponement. They believed that with further work their assays would be substantially increased and that it was possible that sufficient values may be discovered to operate at a profit if efficiently operated. In reality, the actual tenor of their request was a desire to do further prospecting in the belief that sufficient values may be discovered. Under the circumstances, the matter of granting or denying the request for delay in the hearing was discretionary with the Examiner.

They state that both Government witnesses admitted that they were unable to take any samples from a caved tunnel on the claim. The answer is that they could not sample because it was caved in, but they did sample the places pointed out to them by Mr. Haas as places which he thought contained mineral values. It is the duty of a mining claimant whose claim is being contested to keep discovery points available for inspection by the government mining engineers. See United States v. Lem A. and Elizabeth D. Houston, 66 I.D. 161 (1959), and United States v. Pacific Smelting and Refining Company et al., A-30439 (November 30, 1965).

Appellants take offense at the Examiner's statements questioning the qualifications of assayer Colin Donaldson and placing little reliance and credence on his assays. The decision was based on the fact that there was no evidence that he was a recognized assayer, and the fact that his values varied so greatly from all other assays made that there was reason to question their credibility. They now attempt to establish his qualifications as an assayer in the appeal. However, we see no need to belabor this point, as the matter may be disposed of on other evidence also -- the fact that his highest assay of 21.1% manganese is far below the minimum of 35% acceptable to the industry today.

They further contend that the Examiner seems to question the offer made by Kaiser Industries to buy manganese because the offer was not in writing. They state that the offer was reaffirmed in a discussion at the firm's Oakland, California, office and at the Bethlehem Pacific Coast Steel Company, San Francisco, by telephone on August 17, 1964, which was subsequent to the hearing, stating "Neither of the firms' representatives would commit the firm to this price in writing due to fluctuating price from day to day, as well as an anticipated price decline anticipated by the disposal of manganese stock piles held by the United States Government." This does not affirm the fact of a contract; it would appear to constitute an offer only to buy 21.1% manganese ore, if the claimants are able to deliver it, as hereinabove stated.

Under the heading "New Evidence," appellants state: "The following recent assays are submitted for consideration, which assays and results are from assays by reputable firms:

> Metallurgical Laboratories, San Francisco, Calif. 8/26/64
> Manganese 34.96%
>
> Abbot A. Hanks, Inc., San Francisco, Calif. 9/9/64,
> Manganese 35.52%

These assays from samples at discovery cut, development of which is in process with drilling equipment."

The laboratory report dated September 9, 1964 from Abbot A. Hanks was enclosed with the appeal, but not the one from Metallurgical Laboratories. The report from Abbot A. Hanks, Inc., indicates manganese of 35.52% and is labelled "Sample of Pulp" -- "Pulp submitted by Metallurgical Laboratories."

The Departmental regulations provide that the record made in a contest shall be the sole basis for decision on an appeal (43 CFR 1840.0-8). Evidence submitted outside a hearing in a contest case cannot be considered in deciding the case on the merits but can be considered to determine whether it affords a basis for ordering a further hearing in the case. See *United States* v. *Gilbert C. Wedertz*, 71 I.D. 368, 374 (1964). The new evidence submitted by the appellants has been examined for that purpose. The additional information has little or no evidentiary value. Appellants state that the 35.52% sample assayed by Abbot A. Hanks was from the same "random spot of discovery" from which the Government mining engineer had a sample assayed at 0.33% by the same assayer. However, they have made no showing as to how the sample was taken or as to the size, extent or character of the material sampled. They did not state how much material was dug and removed in taking the sample. Furthermore, as the assay by Abbot Hanks was a sample of pulp submitted by Metallurgical Laboratories, the possibility exists that it would have been an assay of concentrates. Samples and assays without sufficient data of extent of the mineral material sampled can mean little or nothing of evidentiary value. *United States* v. *Northern Pacific Railway Co.*, 1 F. 2d 53, 57. Therefore, it is concluded that nothing has been presented which would warrant the ordering of a further hearing. See *United States* v. *Gilbert C. Wedertz*, *supra*.

Accordingly, the Hearing Examiner's decision of July 31, 1964 declaring the claim null and void is hereby affirmed.

Charles D. Haas and Jeanne D. Haas are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

If an appeal is filed, the adverse party to be served is:

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Forest Service, Division of Recreation, United States Department of Agriculture, Washington, D. C. (8)
Forest Service, Division of Lands & Forestry, United States Department of Agriculture, Washington, D. C.
Office of the General Counsel, United States Department of Agriculture, Washington, D. C.
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OPD
Appeals List No. 1
Gower Federal Service
PLS

Mining Claims: Lands Subject to 3400.1

DOCKET FILES

A lode mining claim is properly declared null and void *ab initio* to the extent it was located on lands not open to appropriation under the mining laws for the reason that prior to location of the claim the lands had been patented to the State of California for the use of its park system, with a reservation to the United States of all minerals subject to disposal only by leasing.

Florence L. Heston, Riverside 05579 (April 27, 1966)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 MAY 6 PM 2 49 ③

In reply refer to:
704
Riverside 05579

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

April 27, 1966

Certified Mail
Return Receipt Requested

DECISION

Florence L. Heston	:	Golden Doe Lode Mining Claim
	:	in sec. 25, T. 13 S., R. 4 E.,
	:	S.B. Mer., California.

Decision Affirmed

Mrs. Florence L. Heston has appealed from the August 18, 1964 decision of the Riverside district and land office, determining that the above-identified lode mining claim is null and void to the extent it affects lands in sec. 25, above township and range. The decision stated that, prior to the location of the mining claim, the land in the described sec. 25 was patented to the State of California under State Park Selection Los Angeles 053350, patent #1116901 dated May 20, 1943. The decision recited that all minerals in the described sec. 25 were reserved to the United States and are subject to disposal only by leasing as provided in 43 CFR Part 3324, and the act of March 3, 1933 (47 Stat. 1487), as amended by the act of June 5, 1936 (49 Stat. 1482) and the act of June 29, 1936 (49 Stat. 2026). The grant to the State was under the latter act entitled, "An act to provide for the selection of certain lands in the State of California for the use of the California State park system."

The appellant contends that her claim is in sec. 24 (not within the State grant) rather than in sec. 25, and that she has a notice of location and deeds dating back to 1932. She contends that from her cabin on the Golden Buck claim which lies east of the subject claim, Chariot Mountain is to the southeast whereas it would be due east if the claim were in sec. 25.

The record shows that the Golden Doe claim was located on June 25, 1950 as a quartz claim, and that the location was recorded on July 12, 1950, in Volume 3692, page 42, of the records of San Diego County, California. The record also shows that in a survey by the State of California in 1963, of the lands patented to it for the Anza-Borrego Desert State Park, it ascertained that a house owned by Mrs. Heston on the Golden Buck claim, lying east of the Golden Doe claim, is 250 feet south and 500 feet east of the northwest corner of the described sec. 25. From the dimensions given, it appears that a portion of the Golden Doe claim is located within the described sec. 25. That portion is within the State park, and the claim is null and void to that extent as held in the district and land office decision. Cf. Guenther-Pearson Prospecting Company, A-30243 (March 29, 1965). The appellant has furnished no evidence to refute the record information as to the location of the Golden Doe claim, nor concerning the alleged earlier location of the claim.

The decision appealed from is affirmed.

Mrs. Florence L. Heston is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

If an appeal is taken, the adverse party to be served is:

Park Supervisor
Anza-Borrego Desert State Park
State of California
Borrego Springs, California 92004

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

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Div. of L&M PM (2)
OPD
Geological Survey, Conservation Division (3)
Gower Federal Service
Appeals List No. 1
AHO

DOCKET FILES

Mining Claims: Contests - Answer to Complaint -- Practice Before the
Department 1.2 and 1.3

Where an answer to a contest complaint is filed by a person not authorized to practice before the Department on behalf of a contestee, and where the time for the contestee to file an acceptable answer has expired, the allegations of the complaint will be taken as admitted by the contestee and the case decided without a hearing.

United States v. Edgar Johnson et al., etc., Contest No. 0170935-C-128, etc.
(May 31, 1966) (Riverside)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Contest Nos. 0170935-C-
0170935-C-
(Riverside)

May 31, 1966

CERTIFIED MAIL
RETURN RECEIPT REQUEST

DECISION

United States,
Contestant
v.
Edgar Johnson and Ethel L. Tharp,
Contestees

Contest No. 0170935-C-128 involving the Kay placer mining claim embraci the NE$\frac{1}{4}$ Sec. 18, T. 31 S., R. 38 E. M.D.M., Kern County, California.

and

United States,
Contestant
v.
Ethel L. Tharp,
Contestee

Contest No. 0170935-C-282 involving the Delta placer mining claim embracing the SW$\frac{1}{4}$ Sec. 22, T. 32 S. R. 38 E., M.D.M., Kern County, California.

Decision Affirmed

Mr. Edgar Johnson and Mrs. Ethel L. Tharp have filed separate appeals from that portion of the Riverside land office decision, dated November 9, 1964, rejecting the purported answer to the contest complaint issued against the Kay placer mining claim under Contest No. 0170935-C-128 and declaring the Kay claim null and void.

Mrs. Tharp has also appealed from that portion of the same decision which rejected the purported answer to the contest complaint issued against the Delta placer mining claim under Contest No. 0170935-C-282 and declared the Delta claim null and void.

The record shows that separate contest complaints were initiated against the Kay and Delta placer mining claims in the name of the United States each charging that the land within the limits of the claim is nonmineral in character and that minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery. Mr. Johnson was served with a copy of the complaint for Contest No. 0170935-C-128 on October 1 1961, as evidenced by a post-office return receipt card. Mrs. Tharp was serve with a copy of the complaint for Contest No. 0170935-C-128 on October 13, 1961, and she was served with a copy of the complaint for Contest No. 0170935-C-282 on November 1, 1961, as evidenced by post-office return receipt cards. The complaints also stated that unless the contestees filed an answer to the complaint, as provided in 43 CFR Part 221, [1] a copy of which was attached, within 30 days after service of the complaint, the allegations of the complaint would be taken as admitted and the case decided without a hearing.

On November 8, 1961, a purported answer to the complaint in Contest No. 0170935-C-128 denying the allegations thereof was received in the Los Angeles land office. It was over a manual signature in the name of one of the other several locators of the Kay placer under which appeared the phrase "in Propria Persona" followed by the initials "L.H.R.". It is styled thusly:

CONTESTEES
By Mary Evans
IN PROPRIA PERSONA L.H.R.

On November 30, 1961, there was received in the Los Angeles land office a purported answer to the complaint in Contest No. 0170935-C-282, denying the allegations thereof. The instrument is identical in form and manner of execution with that described in the preceding paragraph, except that it names different contestees in the heading, refers to the Delta placer, and is over a manual signature in the same handwriting, but in the name of Jerome Schmid, one of the several locators of the Delta claim. It is styled:

CONTESTEES
By Jerome Schmid
IN PROPRIA PERSON L.H.R.

The decision appealed from, holding that each of the so-called "In Propria Persona" answers is void as to the parties whose purported signatures appear thereon, is premised upon a finding that these answers were prepared, signed and filed by one Lewis H. Reece, without the knowledge and consent of the contestees named. The land office decision further found in effect that acceptable answers have not been filed by the contestees and their time for filing answers has expired.

The appellants statements of reasons fail to respond to the land office decision, but merely assert that the claims are valid. [2]

---

[1] Regulations now contained in 43 CFR Part 1850.

[2] Where an appellant fails to state reasons why he believes the decision appealed from to be in error, his appeal is subject to summary dismissal. Duncal Miller, 65 I.D. 290 (1958); 43 CFR 1840.0-7.

The departmental regulations (43 CFR 1.2(c)) governing the participation of individuals in proceedings in which rights are asserted before or privileges are sought from the Department defines "practice" to include "any action taken to support or oppose the assertion of a right before the Department," and states that the term "practice" includes any such action whether it relates to the substance of, or to the procedural aspects of handling a particular matter.

Further, the departmental regulations governing private contests provide that a contestee "must" file an answer within 30 days after service of a complaint upon him and that if an answer is not filed as required "the allegations of the complaint will be taken as admitted by the contestee" and the case decided without a hearing. 43 CFR 1852.1-6; 1852.1-7 (formerly 43 CFR 221.64; 221.65(a)). The regulations also provide that proceedings in Government contests "shall be governed" by the rules relating to private contests, with exceptions not material here. 43 CFR 1852.2-2 (formerly 221.68).

A person who, in response to a contest complaint before the Bureau of Land Management, executes and submits an answer, is engaged in an action which relates to a procedural aspect of a contest and as such constitutes "practice" before the Department. Consequently, where a purported answer is executed by one who is not authorized to "practice" before the Department, the answer is unacceptable and ineffective. Cf. Kay Ann Turner, 68 I.D. 85 (1961).

The fact of the appellants' failure to deny the status of Mr. Reece, as determined in the decision appealed from, and their failure to present evidence to prove that it was with their knowledge and consent that Mr. Reece executed and filed the answers in question, or that they ratified such action of Mr. Reece, and also their failure to prove that Mr. Reece is within one of the categories specified in regulation 43 CFR 1.3(3) permitting him to practice before the Department on their behalf, must be taken as an admission that the basis for the land office decision is correct.

As the purported answers are without validity, force or effect, and since no acceptable answers were filed by the appellants within 30 days after service of the contest complaints, it must be interpreted as an admission of the charges of the complaints. As a consequence, the Kay and Delta placer mining claims were properly declared null and void. United States v. J. Hubert Smith, 67 I.D. 311 (1960).

Accordingly, the decision appealed from is affirmed.

Mr. Johnson and Mrs. Tharp are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240.

The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision the total filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures

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Div. of L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
WHW

appeal to Sec
dismissed A-30671 5-16-68

DOCKET FILES

Mining Claims: Common Varieties of Minerals 3511

A deposit of quartzite containing high percentages of silica and low percentages of alkali and magnesia, which may make it more desirable and more economical for use as a silica additive in the mix in the manufacture of Portland cement over other deposits of stone in the general area, but which is used only for the same purpose as the other widely available but less desirable deposits, is a common variety of stone and not locatable under the mining laws since these facts do not give the deposit a special, distinct value.

United States v. Permanente Cement Company, Contest Los Angeles 0169115
(May 31, 1966)

In reply refer to:
704
Contest No. Los Angeles
0169115, Mineral Patent
Application

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

May 31, 1966

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DECISION

United States of America, Contestant	:	Involving the Silica Nos. 1, 2 and 3 lode mining claims located in Sections 30 and 31, T. 3 N., R. 2 E., S.B.M., California, within the San Bernardino National Forest.
v.	:	
Permanente Cement Company, Contestee	:	

Decision Reversed

The Contestant has appealed from a Hearing Examiner's decision, dated October 15, 1964, which dismissed its complaint against the above-captioned claims and held that the Contestee had made a discovery of valuable mineral deposits which are subject to location under the general mining laws.

Permanente Cement Company, the Contestee, filed a mineral patent application for the claims in 1960. The complaint was initiated at the request of the Forest Service, U. S. Department of Agriculture, charging: "5(a) There is no discovery of a valuable locatable mineral deposit within the meaning of the mining laws within the limits of the above-named claims or any of them. (b) $500 worth of labor has not been expended in improvements made upon or for the benefit of Silica No. 1 and/or Silica No. 3 lode mining claims." 1/

The three claims were located for quartzite and, in bringing these proceedings, the Contestant has asserted that the quartzite on the claims is a common variety mineral under Section 3 of the Act of July 23, 1955 (30 U.S.C. § 601 *et seq.*) and was, therefore, not locatable under the mining laws at the time the claims were located.

One expert witness, a mining engineer, testified for the Contestant. Four expert witnesses testified for the Contestee--a geologist employed by the Kaiser Steel Corporation, a mining engineer employed by the Contestee as a quarry superintendent, a mining engineer employed by Contestee as head of its

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1/ Charge 5(b) was dismissed by the Hearing Examiner at the hearing after Contestant's counsel admitted that they had failed to prove it, thus leaving only the question of discovery under Charge 5(a) in issue.

mining and geology department, and a chemical engineer employed as production superintendent in charge of operations at the Contestee's Cushenbury cement plant.

For the purpose of this decision, we will summarize the pertinent testimony and documentary evidence in the case record.

The Contestee company operates a cement manufacturing plant at Cushenbury in southern California located about 5.3 miles from the claims involved in this proceeding. It uses limestone from deposits owned by the Kaiser Steel Corporation. The limestone deposits, however, are deficient in silica content. The cement requires 21 per cent silica in the mix. The company neither owns nor controls any source of silica necessary as an additive in the mix, other than the quartzite deposits on the three claims here in question. Consequently, it has purchased material containing silica from three separate sources located at varying distances from the cement plant. One source is the Mineral Materials Company and the other two sources are from mine tailings from the Cactus Queen Mine at Mojave, California, and from a mine at Barstow, California.

Cement companies prefer to own or control their own source of silica and the Contestee located these claims in 1957 for that purpose. The claims are located on the Chicopee formation, the upper member being a white, hard, dense quartzite, essentially high grade or pure. The deposit on the claims purportedly has a high silica content and low alkali and magnesia contents. High silica content and low alkali and magnesia contents are desirable chemical properties in the manufacture of cement. A high alkali content produces unsound concrete and excessive magnesia causes concrete after placement to expand resulting in cracking or complete failure. There are substantial deposits of the quartzite on the three claims. The Government witness estimated 250,000 tons on the Silica No. 2 and approximately 500,000 tons on each of the other two claims, the width of the vein averaging 50 feet.

One of Contestee's witnesses testified that a high grade material is being used in the cement industry with general specifications of from 95 to 98 per cent silica, not over two-tenths of a per cent alkali and low magnesium (Tr. 234, 235 and 272). Contestee's evidence (Ex. J) indicates an average silica content in the deposit on the claims of 95.86 per cent. The Contestant's witness testified that the deposit on the claims is a white, hard, dense quartzite and, as confirmed by assays, is essentially high grade or pure quartzite. (Tr. 37). His samples disclosed 98.96, 99.01, 98.73, 99.04 and 99.0 per cent silica and only traces of alkali (Tr. 99). Evidence as to the silica content in the deposit on the three claims is inconclusive, and Contestant's counsel questioned Contestee's methods of analyzing the samples through cross-examination of Contestee's witnesses. However, in view of the high percentages shown by Contestant's own witness, we will concede, for the purpose of this decision, Contestant's contention of a 95.86 per cent silica content.

One of Contestee's witnesses testified that the higher the silica content in quartzite used for cement stone as a source of silica, the better, and with respect to other materials "At the present time, for instance, at Permanente, it must have low alkali and low magnesium." (Tr. 147). Another witness, on cross-examination by Contestant's counsel, in answer to a question of whether he could describe the requirements that a source of silica would have to meet in order to be usable by his company, said:

> Well, normally it should be high silica, low in alkali, and low in magnesia. How high the silica, how low the alkali, as you have seen from this exhibit here we can under conditions by varying the other materials operate with lower silicas. It is a matter of the cost of the material. It all comes down to the economics of it, of the total cost of raw materials per barrel, and, to try to state specifically what we need, which is the most economical or what would be the most economical, it comes right down to it has to be determined by adjusting these costs for the total raw materials per barrel. (Tr. 267).

The evidence further shows that the tailings of the Cactus Queen Mine near Mojave contains 83.08 per cent silica, 1.06 per cent alkali and 0.54 per cent magnesia, and for the Barstow mine tailings it is 75.54 per cent silica, 1.88 per cent alkali and 1.04 per cent magnesia. (Contestee's Ex. J). These are two of the sources from which Contestee is obtaining silica, as mentioned hereinabove.

Contestee has used 18,000 tons of quartzite from the Silica No. 2 claim in the manufacture of cement at its Cushenbury plant. This material was mined by a contractor. The first of the quartzite, according to testimony, that was removed contained approximately 95 per cent silica, but the contractor began removing lower grade siliceous material in the footwall, which dropped the silica content to lower percentages. The contractor was stopped and Contestee deferred to the request of the Forest Service not to mine any more from the claims until the question of whether the material is or is not a common variety could be determined.

The proven reserves of limestone are sufficient to operate the Cushenbury plant for 24 to 36 years. The amount or 17,000 tons of silica additive is required by the plant each year or, at the estimated 36-year life of the proven limestone reserves, a total of 612,000 tons. The mining engineer employed as quarry superintendent by Contestee testified that 273,900 tons of the lode quartzite bearing the higher percentage of silica could be mined with little or no stripping and that 876,100 tons could be removed on a "1 to 1 stripping plan."

Use of quartzite from the three claims would be more economical to the Contestee than from any of the three sources from which they purchase silica material. It is much closer to the claims than any of the other sources, being only 5.3 miles from the plant, all over paved road, except for 2,200 feet of road constructed by Contestee from the paved highway to the claims. The estimated cost for the material would be $3 per ton, consisting of mining, crushing, hauling and plant handling. There would be no royalty payments or purchase price for the material, while the other sources of supply include cost of the material and long distance haulages. The available material at one of the sources is sufficient to supply the plant for only six months and another source represents only a ten-year supply.

Quartzites are of common occurrence, but there are different types or qualities of quartzite. Material bearing from 60 to 100 per cent silica may be classified as quartzite. For cement manufacture, a quartzite bearing a high percentage of silica is desirable. On the other hand, quartzite suitable for ornamental building stone and facing may contain as little as 60 per cent silica. There are several quartzite occurrences in the area of these claims. The Government witness mentioned the Saragossa formation, located about two miles from the subject claims, and which he stated contains quartzite having a thickness approximating 3,000 feet. He sampled this formation and found that it had qualities closely approximating the qualities of the Chicopee formation located on the claims in question. He took grab samples from the Saragossa formation, which analyzed 91.88, 95.08, 94.08 and 97.02 per cent silica (Contestant's Exhibits 8 and 11). The Contestee took and analyzed a sample from the Saragossa formation from the same general area as Contestant's samples, which analyzed 87.0 per cent silica, 0.41 per cent alkali and no magnesium oxide (Tr. 204), and a witness for the Contestee stated that material such as represented by that sample could be used by the company in making cement. (Tr. 205).

The Hearing Examiner held, in substance, that the quartzite deposits on these three claims are not "common varieties" within the meaning of the Act of July 23, 1955, supra, because they meet all of the criteria to classify them as an "uncommon variety", as defined in Departmental regulations in 43 CFR 3511.1(b), which reads:

> "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not "common varieties." This subsection does not relieve a claimant from any requirements of the mining laws.

Appellant (Contestant) contends in its appeal, inter alia, that quartzite is one of the most widespread of all rocks, and its principal component, quartz, the material for which claimant values it, is the commonest of all solid minerals. It is a common variety of stone, not subject to the mining laws; and its status in this respect is not changed as to a quartzite deposit situated so near to a cement plant as to be economically usable in cement making. Contestant cites, in support of this contention, the Department's decision in United States v. Alfred Coleman, A-28557 (March 27, 1962), which case involved mining claims for building stone purposes located on the quartzite deposits of Gold Mountain, which is the area hereinabove referred to as the Saragossa formation, which reputedly has properties somewhat approximating the deposits on the claims involved in this proceeding. In the Coleman case, the Department said: "In view of the immense quantities of identical stone found in the area outside the claims, the stone must be considered a 'common variety' within the meaning of the act."

Upon review of all of the evidence in the instant case, it appears that the uses to which Permanente puts the deposits from these claims are the same as the uses to which similar but less desirable deposits of the general run of the same material of widespread occurrence in the area have been put, hence the deposits on the claims must be considered to be "common variety" mineral materials.

Contestee's Exhibit L, which is an article entitled "Quartzite and Quartz" from Bulletin 176--Mineral Commodities of California by the California State Division of Mines, states: "Quartzite, vein quartz, and quartz gravel are widespread in California. Quartzite occurs in the desert regions, . . . Quartzite known to be suitable for commercial silica occurs in the desert regions of southern and eastern California. . . ."

The publication "Nonmetallic Minerals", second edition, by Ladoo and Myers under the subject "Quartz and Silica" on pages 419 and 420 reads, in part:

> The minerals that consist essentially of pure silica--SiO_2, silicon dioxide--are among the most abundant in the earth's crust. Of these minerals quartz is the most common. . . .
>
> Quartz Forms Based on Industrial Use.
>
> . . . .
>
> 3. Silica
>
> Lower grades, such as massive, opaque quartz, quartzite, and ground sand, used for chemical and industrial purposes
>
> . . . .
>
> 5. Stone
>
> Sandstone and quartzite used for structural purposes

. . . . .

> Silica is one of the principal components of the earth's crust and, in its various forms, is universally distributed. Of the most common varieties commercially important, quartz is mined chiefly from pegmatite dikes, from veins, ...

and "Mineral Facts and Problems", 1960 edition, Bulletin 585 of the U. S. Bureau of Mines, under the chapter "Cement" on page 167, states in part:

> Raw Materials
>
> A very large number of raw materials is theoretically available for making Portland cement, but the number has been reduced to a comparative few at the majority of plants in the United States. Argillaceous limestone, or "cement rock," of very close to the desired lime-silica-alumina proportions, is combined with minor quantities of other materials to produce the proper mixture at approximately one-fourth of the total number of cement plants. At the others, the necessary lime is supplied by limestone, oyster shells, or marl; the silica by sand or sandstone (or as a component in clays and shales); . . .

Thus it is evident that silica is of widespread and common occurrence throughout the desert area of southern California, and that it can be obtained from sources other than quartzite, which is also widespread and of common occurrence. In view of the common occurrence of silica and quartzite, under the regulation 43 CFR 3511.1(b) it must be shown that such a deposit "has distinct and special properties" in order to be an "uncommon variety." The evidence has not shown any distinct and special properties in the deposit on the claims, even conceding that it contains 95.86 per cent silica, less than two-tenths per cent alkali and is very low in magnesia, and for these reasons may be more desirable for use in cement manufacture than more average deposits. The Contestee has shown by its evidence that materials from two other sources that it is or has been using in manufacturing cement contain far lower percentages of silica and considerably higher percentages of alkali and magnesia (Exhibit J). This points to the fact that the large deposit from the Saragossa formation located in close proximity to the claims could be used. The evidence does not indicate the lowest limit of silica content, or the highest limits of alkali and magnesia contents, that could be used in cement manufacture, but testimony of Contestee's witnesses indicates that these percentages may vary by varying other materials in the mix, as brought out by testimony hereinabove quoted from page 267 of the Transcript.

The main consideration here appears to be economics, the lower cost of the material from the claims, there having been no royalty or purchase price to pay for the material and the haulage distance to the plant being much closer than the other sources of supply. This does not give the material any distinct or special property, nor would the fact that cement companies prefer to own their own source of silica supply have any bearing on the matter. The fact that by owning its own claims the company would not have to pay a purchase price for the material does not mean that the material per se possesses a distinct, special economic value for the use over and above the normal uses of the general run of such deposits. Common varieties as defined above include deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits.

As for limestone deposits which are of wide occurrence, in his opinion on Determination of What Constitutes a "Common Variety" of Limestone Used in the Manufacture of Portland Cement, M-36619 (Supp.) (October 5, 1961), the Associate Solicitor said, in part:

> It is our understanding that almost any limestone deposit may be used in the manufacture of Portland cement if enough other substances are added to it. . . . Consequently, we believe that the legislative history taken as a whole as well as the language of the statute clearly indicate that limestone used in the production of cement should in some cases be classified as a "common variety" within the meaning of the Act of July 23, 1955, supra. . . .

In United States v. D. G. Ligier et al., A-29011 (October 8, 1962), it was held: (Syllabus): "Building stone suitable for construction purposes which is found in an extensive range of pleasing colors, has high compressive strength and light weight, but can be used only for the same purposes as other widely available but probably less desirable deposits of the same material, is a common variety of building stone and not locatable under the mining laws since its special characteristics do not give it a special, distinct value." (Underscoring added).

Also, in United States v. J. R. Henderson, 68 I.D. 26, 29 (1961), the Department said: "The fact that these sand and gravel deposits may have characteristics superior to those of other sand and gravel deposits does not make them an uncommon variety of sand and gravel so long as they are used only for the same purposes as other deposits which are widely and readily available." (Underscoring added). The use to which a common material is put cannot make the lands in which it is found subject to location under the mining laws, if the use is not dependent on any unusual characteristic of the material itself. See United States v. Mary A. Mattey, 67 I.D. 63, 68 (1960).

Therefore, the quartzite deposits on the claims are held to be a common variety material.

Accordingly, the Hearing Examiner's decision of October 15, 1964 is hereby reversed, the Silica Nos. 1, 2 and 3 lode mining claims are declared null and void and mineral patent application Los Angeles 0169115 is rejected.

Permanente Cement Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all three adversely affected by this decision the total filing fee is $15. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of establishing wherein the decision appealed from is in error

If an appeal is taken, the adverse party to be served is:

Office of the General Counsel
U. S. Department of Agriculture
630 Sansome Street, Room 860
San Francisco, California 94111

James F Doyle
Chief, Office of Appeals
and Hearings

Enclosures

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DOCKET FILES

Mining Claims: Discovery 3413

The mere willingness of mining claimants to expend further time and money in prospecting and exploration work is insufficient to establish the presence of a discovery on a mining claim.

The discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values.

Although a mining claim may have possibly been valuable for minerals in the past, there is no discovery when it is not shown as a present fact that the claim is valuable for minerals.

Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals.

Mining Claims: Mill Sites 3417

A mill site is properly declared null and void when it is neither being occupied nor used for mining or milling purposes.

United States v. E. R. Wilson and Kay Hazelton Wilson, Mineral Contests LA 0170969-C-37 and 38 (June 21, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1966 JUL 5 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Mineral Contests
Nos. LA 0170969-C-37 and
38

June 21, 1966

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DECISION

United States of America,
Contestant

v.

E. R. Wilson,
Kay Hazelton, also known as
Kay Hazelton Wilson,
Contestees

Involving the Yellow Spot Nos. 1, 2 and 3 lode mining claims and the Cotton Wood Mill Site located within Sec. 36, T. 25 S., R. 44 E., and Sec. 1, T. 26 S., R. 44 E., M.D.M., recorded in Mining Claims Book 265, page 360; Book 268; pages 117, 118 and 116, 117; and Book 263, page 494, Official Records of San Bernardino County.

Decision Affirmed

The above-named contestees have appealed from a Hearing Examiner's decision, dated January 21, 1965, which (1) declared their Yellow Spot Nos. 1, 2 and 3 lode mining claims null and void because there has not been a discovery of a valuable mineral deposit on any of the claims as required by law, and (2) declar their Cotton Wood Mill Site null and void because it does not contain a quartz mill or reduction works and is not presently being used for mining or milling purposes.

After a careful review of the entire case record, we are of the opinion that the Hearing Examiner's decision is correct. He adequately summarized the evidence and correctly applied the ruling case law to the facts.

Because of the broad contentions raised by the appellants in their appeal, we find it necessary to summarize fully the testimony and documentary evidence presented at the hearing, as well as other pertinent facts in the case record.

The four claims were located by the contestees on various dates in the year 1938 Prior to the 1938 locations the claims had been known as the Colorado Mines Clai Paragraphs 4 in both contest complaints issued by the Government stated, in substance, that a leasehold estate had been condemned in the claims for use by the Department of the Navy in connection with its Mojave "B" Gunnery Range; that an order of immediate possession had been entered in the proceedings on September 2, 1943; and that the lands, at all times since September 2, 1943, hav been under the jurisdiction of the Department of the Navy. Whether the order of possession of a leasehold estate only in the claims amounted to a segregation of the lands and was thus tantamount to a withdrawal of the lands from further mining is not certain. If it did and the Navy exercised exclusive jurisdiction after that date, the determination of validity of the claims would have to be made as of September 2, 1943. The Examiner, in his decision, referred to the invalidity of the claims in the present tense. However, the question of the proper date for determination of validity is moot in this case because the evidence is conclusive enough to prove invalidity of the claims as of the present, as well as of September 2, 1943.

A mining engineer, who was duly qualified as an expert in the field of mining, testified for the contestant. He stated that he examined the claims on June 8, 1963 in company with Mr. Wilson, one of the claimants, who identified the claim and also showed the workings. He made subsequent examinations of the claims on December 14, 1963 and April 4 and 26, 1964.

The engineer depicted the locations of the claims on sketch maps which were received in evidence as Contestant's Exhibits 7 and 8, which maps also showed the workings on the claims. At the hearing Mr. Wilson disagreed as to the location of the claims as shown by the engineer on Exhibit 7. After a discussion off the record, the Hearing Examiner announced that Mr. Wilson had designated an area west of the claims as shown on the exhibit as being the Yellow Spot No. 3 claim, which area had not been examined by the Government; that he is accepting testimony as to the location of the Yellow Spot Nos. 1 and 3 claims designated on Exhibit 7 [1]; and as Mr. Wilson has announced the abandonment of the claim designated Yellow Spot No. 2 on the map, no evidence will be offered as to that claim [2]; and that if agreeable with the parties he would order a reexamination of the area designated by Mr. Wilson as the Yellow Spot No. 3 claim, the report of examination to be submitted to the Hearing Examiner with motion to reopen the hearing if deemed necessary as to that one claim (Tr. 17 and 18).

The engineer testified that on the Yellow Spot No. 1 [3] there are workings to the north and south of a gulch. The workings in the north are more extensive, extending about 50 feet in a northwesterly and easterly range, and exploration easterly and westerly is about 120 feet. There is evidence of what may have been stoping and stripping years ago, and evidence at the top of a vein of quart that possibly someone around the turn of the century may have had a two or three inch strike of ore which was scraped out. It is impossible to know how much, if any, or of what quality this seam might have been years ago (Tr. 13 to 15).

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[1] In his testimony later, Mr. Wilson indicated that he called the location depicted on the map as Yellow Spot No. 1, the Yellow Spot No. 2 and designated the Yellow Spot No. 3 shown on the map as the Yellow Spot No. 1

[2] Actually meaning as to the area covered by that claim as shown on Exhibit 7.

[3] Referred to by contestee Wilson as the Yellow Spot No. 2.

He further testified that he took 22 samples, consisting of standard channel cuts, chip samples across the vein widths. He noted the identification and location of each sample on Exhibits 7 and 8 along with the width cut, the widths varying from 2 feet to $6\frac{1}{2}$ feet on the assay cuts. He delivered 18 samples to Eisenhauer Laboratories and 4 samples to Smith-Emery Company, all being delivered personally with instructions to assay for gold and silver by fire assay. The assay reports (Contestant's Exhibits 9 through 9e and 10) show nominal values, except for four samples which ranged from $6.93 to $7.96 a ton. He stated that these four were the only assays out of the 22 that approached a point of interest warranting a little exploration provided the geologic factors didn't go against that proposition (Tr. 22). He stated that there was no mining equipment on the mill site and it was not being used for mining or milling purposes. There were just rusted remnants of several tanks which may have been used many years ago for bleaching or other purposes, a few foundations of what might have been cabins or buildings, no machinery and no quartz mill or reduction works on the claim (Tr. 25). He expressed the opinion that there are insufficient minerals on the lode claims to warrant a valid discovery and inferred that the field evidence he obtained indicated exhaustion of the minerals or that the minerals had been worked out, and testified that unless further development shows there is a possible extension or promise of another ore shoot, there is no valid discovery; and that from evidence of samplings of the peripheries of the area worked and exploration in the past and the faces, there are no ore shoot possibilities of any significance, or even of a halo zone leading to an ore shoot (Tr. 27).

On cross-examination, the Engineer stated that the samples were taken subsequen to the first visit with Mr. Wilson and the latter pointed out what he knew abo the property and what he definitely could assert in the one spot in one tunnel; and that Mr. Wilson made no particular, definite statements with great enthusiasm, and he could see that he (Mr. Wilson) wasn't too particular. He made a detailed examination later of a much greater area than was even mentioned or contemplated by the claimant. On questioning by the Examiner, the engineer testified that $22 a ton for gold and silver would be the break-even value for mining costs and it wouldn't be profitable for anyone who didn't have that much in a claim to work at it. The $22 figure was taken from the official publication of the State of California, Division of Mines, Vol. XIII, No. 12, December, 1960.

The Government thus established a *prima facie* case and it was then incumbent upon the contestees to establish the validity of their claims by a preponderance of the evidence. *Foster* v. *Seaton*, 271 F. 2d 836 (D.C. Cir. 1959).

A Mr. Donald Gagnon, testifying for the contestees, stated that he had been associated with the mine since 1929 and that it was quit-claimed to him in about 1936 or 1937. He operated it then and gave Mr. Wilson a one-half interest in either 1938 or 1939 to go in with him on it. He later transferred his remaining one-half interest and got out of it because, as he stated "I had my belly full of it." (Tr. 48). He further stated that the last time he was up there was in 1948, he thought, and that the tracks and the ore car and part of the mill were still there, but that they [4] had taken the Fairbanks-Morse gas engine away and stripped everything else, and that they had hauled everything away and had burnt the cabins down, all but the one they had converted over out of a barn. He testified that when he turned the claims over to Wilson the buildings and the mill were there; and that they put the mill in operation but ran out of money and had to ship ore in order to get more money.

On cross-examination Mr. Gagnon testified that the claims were named the Colorado at the time he owned them; in 1936 or 1937 when he took over the claims, there were a ball mill, the Fairbanks-Morse gas engine and tanks on the mill site; and that there had been a crusher, but he didn't remember whether the crusher was still there or not. When he took over he put the mill site in operation, overhauling the engine and mill and put in a classifier and an elevator system to bring ore from the classifier back into the mill; cleaned out a well and boarded it up to keep the pack rats out and rebuilt the cabin for a place to live. He testified that he didn't do much milling, but got the mill started and ran out of money; then shipped ore to Burton Brothers and hauled it to Rosamond (Tr. 60). He personally didn't mill any ore and didn't know how much ore Wilson milled. He quitclaimed the claim because he was done with mining (Tr. 63). He did not know what improvements Mr. Wilson may have made on the claims after he quitclaimed to the latter and quit mining. He had no contact with Wilson after that, although he went up there occasionally for the trip but didn't pay any attention to what was going on (Tr. 64). He further testified that the workings on the Yellow Spot Nos. 1 and 3 [5] existed in 1929, but they went in and developed them more; that he didn't do any mining operations himself but did mostly shipping of what was already taken out, and didn't know whether any further mining operations had been done during the time (Tr. 69 and 70); and that he had given Wilson the one-half interest because he needed him to operate the mill (Tr. 71).

Mr. E. R. Wilson, in his own behalf, testified that he did work on the Dean Vista tunnel on what he calls the Yellow Spot No. 1. [6]

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[4] The testimony does not indicate who "they" were but undoubtedly he had no actual knowledge as to the identity of the person or persons responsible.

[5] Designated by Mr. Wilson as the Yellow Spot Nos. 2 and 1, respectively.

[6] Identified on Contestant's Exhibit 7 as Yellow Spot No. 3.

He identified some photographs taken in 1949 on the claims, stating that he had gone back up there to mine after he got a little money. He stayed there about 12 months and then went back to work in Trona, leaving his wife up there. He then went back to the claims to move out, locked up his shack and never returned to the claims for a good many years. He stated that the mill and part of the engine were still there in 1949; they 7/ had stripped everything (Tr. 80). He returned to the claims on or about September 7, 1964 (shortly before the hearing in this proceeding) to take samples. He testified that he took samples from the Dean Vista tunnel on the claim he identified as Yellow Spot No. 1; and also took a sample from the claim he has designated as Yellow Spot No. 2, from what he called Poco Hole, which he calls a coyote hole. This latter sample assayed $15.75 and five other samples from the Dean Vista tunnel assayed $39.79, trace, $3.50, $29.40 and $40.50 (Contestees Exhibit M). He further testified as to numerous samples he had taken and had assayed before shipping ore to see if they had values to ship. The samples were taken in 1937 and 1938 (Contestees Exhibit N) from a dump (Tr. 102). He stated that he was not satisfied with payments they were getting from shipments of ore, so he had the assays run to see if it would pay them to haul the ore, as they couldn't afford to make a shipment without getting paid for it (Tr. 102). On examination by Contestant's counsel as to the size and nature of these samples, Mr. Wilson stated that "it all depended on if you have got a couple of tons you end up by shoveling it once. Then you work it down by a method, a common method of assaying to about 5, 10 or 15 pounds", that the amount of ore submitted to the assayer for the samples was 5 or 10 pounds, and that the material for the samples came from a dump and not from the mine (Tr. 90). He was confused in his testimony as to where the samples came from. The witness also introduced assay certificates, which were accepted in evidence as Contestees' Exhibits O through T, containing assay results of numerous samples taken in 1937, 1938, 1939 and 1946, showing very high values in gold and silver.

On cross-examination, Mr. Wilson testified that he made three shipments from the Dean Vista tunnel, which averaged about 2.75 tons and $60.14 a ton. This was sorted ore and included no country rock. After he shot it down he sorted out what he considered the best shipping ore (Tr. 115). He did not ship any ore from any other place than the Dean Vista tunnel (Tr. 116) and most samples were taken from pockets (Tr. 119). He stated that sample DV-50, shown by Contestees' Exhibit P as having a value of $1,937.46 a ton, was taken from the Trona Vista tunnel and "was a freak. I admit it was a freak" (Tr. 125). Sample DV-51, shown on Exhibit P at a value of $326.69 a ton, was taken from the Dean Vista tunnel, but he testified that he had never mined anything from the area of the DV-51 sample because "It was up off the ground. We didn't have money to put in. I couldn't stand a jack up there and I can't pay for a compressor. So, we had to let it go by." (Tr. 126). In reply to a question of whether the samples assayed in 1946

7/ He did not identify who "they" were.

(Exhibit R) were concentrates, the witness replied "No, it is not concentrate, no. You are just working your sample down. I mean, you put it out there, say, you got a hundred pounds there. Ordinarily you stack it up and continue to shovel it here and then shovel it there. Then you take this mill and get it down. We use what is called a 'Joe Splitter.' The stuff is small emough. So, you go break up your larger pieces to a certain size or approximately a certain size. Then you finally get it down until you get a sample that you can ship to the assayer." (Tr. 128). He further testified that in that country "your formations in gold mining, I have seen, you have had hot spots or shoots. It occurs along in spots and you might call it a pocket if you want to. I just call it a rich spot in the vein." He admitted that a high grade assay from such pockets is not representative of the ore that is in the entire vein (Tr. 131).

On cross-examination concerning the mill site claim, Mr. Wilson testified that the principal thing he did on that claim after obtaining his interest in it was to improve the living conditions; that he did a little extra work around the mill "hoping, you know, later to get it running," and that he didn't mill much ore because after they got the mill all started running he discovered that the "minings" in the mill weren't sufficient to running the ore and they had to shut down and never could get enough money to get going (Tr. 135). He left the claim in the latter part of 1939 and did no further mining after that except assessment work (Tr. 136).

At the close of the hearing, in view of the great differences in the values shown on the assay reports, the Examiner ordered a resampling of the claims by the parties in the presence of each other, along with sampling of the Yellow Spot No. 3, which Mr. Wilson had indicated lies on the west side of the claims as shown on Contestant's Exhibit 7; the samplings to be taken from virgin material in an area indicated by the contestee, but not in the exact spot indicated by the contestee, and the samples to be sent to a recognized assayer. Both counsel indicated agreement with this procedure. The Examiner then announced that the case would be open until such time as that report was made and that a determination would be made at that time as to whether additional testimony should be taken; and that if they are satisfied with the report they need not come back for a rehearing (Tr. 132-135).

The Regional Solicitor's letter of November 16, 1964 to the Hearing Examiner submitted evidence of samples cut by the Government engineer with the approval of Mr. Wilson as to locations. The evidence consisted of an amended sketch map showing the location of the three claims as positioned by Mr. Wilson, with locations of the joint resampling indicated along with their relationship to the locations of the sampling previously introduced in evidence by the contesta an assay certificate by Eisenhauer Laboratories, which shows three samples, designated YX-1-1, YX-1-2 and YX-1-3, taken from the Yellow Spot No. 1, assaying $29.75, $2.73 and $2.51, respectively, and samples YX-3-1 and YX-3-2 from the Yellow Spot No. 3, assaying $2.07 and $2.27, respectively; and three photographs showing certain sampling points. A copy of the Regional Solicitor's letter, together with copies of the enclosures, was sent to Mr. Wilson. Nothing was received from Mr. Wilson as to this evidence and it, therefore, must be presumed that he concurred in the sampling, the procedure in taking the samples and the results.

In his decision, the Hearing Examiner referred to this additional evidence as a post hearing exhibit, and he correctly correlated the results with the results of assays previously submitted by contestant, as follows:

> Sample No. YX-1-1 was taken over a 15-inch vein at the portal of the Dean Vista tunnel in the same area at which previous Sample No. YS-3-1 was taken over an 18-inch vein. The present sample had a value of $29.75 per ton and the previous sample had a value of $2.63 per ton. Sample No. YX-1-2 was taken over a 30-inch stringer in the tunnel at a point between previous samples CW-12 and YS-3-2. Previous samples CW-12 and YS-3-2 had values of $1.66 and $2.33. The present sample shows a value of $2.73. Sample YX-1-3 was taken over a distance of 3 feet in the tunnel from a point south of previous sample CW-11. Previous sample CW-11 had a value of .66¢ and the present sample shows a value of $2.51. Sample YX-3-1 was taken in an area north and west of the tunnel on the Yellow Spot No. 3 claim. No previous samples were taken from this area. The assay report on this sample was $2.07 per ton. Sample YX-3-2 was taken from a 2½-foot discovery cut on the Yellow Spot No. 3 claim. The assay report was $2.27 per ton.

From a thorough study and analysis of the evidence, we hold that the contestees have failed to prove the validity of their claims by a preponderance of the evidence. They did not meet the prudent man test of Castle v. Womble, 19 L.D. 455 (1894), which was affirmed by the Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905). It has not been shown that a prudent man would be justified in spending time and money on the claims in the expectation of develop a paying mine. The evidence indicates that someone may have struck a pay shoot years ago, but that any valuable mineralization has since been worked out. Although a claim may have possibly been valuable for minerals in the past, there is no discovery when it is not shown as a present fact that the claim is valuable for minerals. United States v. David L. and Kathryn King, A-30217 (December 29, 1964).

Contestee presented in evidence assay reports of numerous samples showing high mineral values. However, the evidence indicates that most of the samples were taken from a dump on the claims and were concentrated samples and as such they would thus not be representative samples as would be obtained through standard sampling procedures, such as was carried out by the Government engineer. Furthermore, as to the samples taken from pockets the contestee admitted that such values would not represent an average value throughout the vein or lode. The 22 samples taken by the Government engineer were of low values, as were 4 of the 5 samples taken by him in the joint resampling ordered by the Examiner. One of these samples assayed at $29.75 per ton, but it was only an isolated instance, and even if the mine contained a sizeable block of ore averaging that value—and the evidence points to the contrary—it would still be very questionable whether a prudent man would be justified in mining it, in view of the $22 per ton mining costs testified to by the contestant's witness. The discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values. United States v. John L. Cooper et al., A-30267 (May 11, 1965). Mr. Wilson testified to three shipments he made which averaged $60.14 a ton, but he stated this was sorted ore, included no country rock and that he had sorted out what he considered the best shipping ore. However, there is no evidence of how much rock he had to mine in order to select shipments of this value. Thus this evidence has no probative value.

Contestees' evidence is very inconclusive as to actual mining operations on the claims, and the amount of ore shipped from the claims. Both Wilson and Gagnon testified to money problems and the evidence presented as to actual shipments of ore is that it was sorted ore, indicating that the mining was not a paying venture. Mr. Gagnon testified that he got rid of the claims because he had his belly full of it and quit. Mr. Wilson left the claims in 1939 and did no further mining after that except assessment work. All of the evidence points to the fact that they were prospecting and exploring with the mere hope of striking valuable ore. The Department has long held that there is a distinct difference between exploration and discovery. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. See United States v. John L. Cooper et al., supra; United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961). The mere willingness of mining claimants to expend further time and money in exploration is insufficient to establish the presence of a discovery. United States v. Robert Hight et al., A-30256 (April 21, 1965). We hold that there is no present discovery of valuable minerals on the lode claims and that there was no discovery as of September 2, 1943 and that the lode claims are thus null and void.

As for the mill site, the only definite evidence of use was for living quarters and use of the well that exists on the claim. Contestees' evidence indicates that there was a mill on the claim but very little use, if any, was made of it. It is clear that there is no mill presently on the claim and it is questionable whether a mill existed on the claim on September 2, 1943. Wilson left the claim in 1939 and did not return until 1946. Therefore, no use was made of the mill after 1939, if, indeed, it was actually used for milling ore at any time previous to that. A mill site is authorized by 30 U.S.C. § 42 when the land ". . . is used or occupied . . . for mining or milling purposes, . . ." A mill site is properly declared null and void when it is neither being occupied nor used for mining or milling purposes. See United States v. John L. Cooper et al., supra.

The above discussion refutes the appellants' statements of reasons for appeal, which are briefed as follows:

(1) The evidence was not sufficient to sustain the Hearing Examiner's opinion that the claims are null and void; that the evidence showed the claims had been worked and buildings and structures had been placed on the claims and mill site; that Mr. Wilson testified that the claims had been worked during the years 1937, 1938 and 1939 and that he derived his sole means of income and living from profits from the mining operations; in 1940 he was unable to continue operation because he needed funds to obtain new equipment and machinery but before he could accomplish this the Second World War prevented his return to the claims until 1947, at which time he found they had been taken over by the Navy.

(2) The evidence is insufficient to sustain the Examiner's conclusion that the mineralization was sufficient only to justify further exploration rather than development; that Wilson testified that he had made three shipments averaging about 2.75 tons each and the average recovery was $60.14 per ton; that no evidence was presented to show that the samples on October 17, 1964 were properly taken; [8] there is no requirement that the value of the minerals found be proved beyond a reasonable doubt; that the fact that Mr. Gagnon stated that he "had his belly full of it" is not sufficient to establish that the claims are not valuable; [9] that Wilson expressed his willingness and desire to continue exploration and discovery work in the hope of finding further valuable minerals; accordingly, the evidence was sufficient to justify the development and mining of the mineral deposits on the claims.

(3) The evidence was not sufficient to sustain the Examiner's opinion that the mill site was null and void; the mill site was located for use and actually was used in connection with the claims in question, in fact, it was used until 1940 when the contestee temporarily discontinued operations in order to obtain financing to improve the machinery and equipment on the claims and to rebuild the machinery and mill on the mill site.

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[8] Refers to the joint resampling after the hearing and the post-hearing exhibit

[9] This statement was referred to by the Examiner in his decision.

(4) The contestee spent many years working the claims in question and spent a considerable amount of his own time and money in working the claims and in placing improvements on the claims and the mill site.

As noted above, the appellants have not shown error in the findings of fact and conclusions of law herein set forth. However, two statements by the appellants do require some discussion. One is the statement that no evidence was presented to show that the samples on October 17, 1964 were properly taken. The samples were cut by the mining engineer--the contestant's expert witness--with the approval of Mr. Wilson as to the locations. Copies of this evidence were sent to Mr. Wilson, who took no action whatever to refute the evidence, question it or to interpose any objections. Therefore, we do not feel that any further hearing was necessary under the circumstances. We agree that the fact that Mr. Gagnon stated that he "had his belly full of it" is not sufficient to establish that the claims are not valuable. The Examiner merely quoted this statement as an indication of a lack of faith on the part of Mr. Gagnon in the claims. This was just one little element, among the great weight of other evidence, that points to the lack of validity of the claims.

The Hearing Examiner's decision of January 21, 1965 is hereby affirmed.

The contestees are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all four claims adversely affected by this decision the total filing fee will be $20. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken, the adverse party to be served is:

Regional Solicitor
U. S. Department of the Interior
7759 Federal Building
300 N. Los Angeles Street
Los Angeles, California 90012

John B. Ceccolo

Acting Chief, Office of Appeals and Hearings

Enclosures

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Div. of L&M PM (2)
OPD
Appeals List No. 1
Gower Federal Service
PLS

appeal to Sec
affirmed A-30697
5-31-67

DOCKET FILES

Mining Claims: Discovery 3413

Mining claims are properly declared null and void for lack of discovery of valuable mineral deposits when the evidence discloses that only low values of manganese and other minerals are present on the claims.

United States v. Rodney Wood et al., Contest No. 5908 (Sacramento) (July 1, 1966)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1966 JUL 15 AM 10 00

In reply refer to:
704
Contest No. 5908
(Sacramento)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

July 1, 1966

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States,
Contestant
v.
Rodney Wood, Individually and as Administrator of the Estate of W. R. Wood, Deceased; Wallis R. Wood; Walter S. Wood; Victor Wood,
Contestees

Banner Mine, Hillside, Broken Baro, Broken Barrow, Snip, January, Unity, Fresno, Karan, and Secret mining claims situated in Sec. 1, T. 33 N., R. 4 W., and Sec. 36, T. 34 N., R. 4 W., M.D.M., Shasta County, California

Decision Affirmed

Mr. Rodney Wood, on behalf of the above-named contestees, has appealed from a decision of a Hearing Examiner, dated February 12, 1964, declaring the above-identified mining claims null and void for lack of discovery of a valuable mineral deposit on any of them.

The amended contest complaint initiating adverse proceedings against the mining claims, at the request of the Forest Service, U. S. Department of Agriculture, charged that the existence of a deposit of valuable mineral of sufficient quantity to constitute a valid discovery is not disclosed within the boundaries of the mining claims. A hearing was held on July 23, 1963, at which all parties were represented by counsel.

The claims are in the Shasta National Forest about 5 miles northeast of Project City, California, on and near Cove Creek in the vicinity of the Pit River Arm of Shasta Lake. The mining claims involved were located between January 6, 1903 and April 10, 1922. The minerals referred to are manganese, iron, gold, silver, copper and silica.

The Secret and Unity claims are now partly on an island in Shasta Lake. The lake on December 5, 1961, when the claims were being examined, had dropped so that one could walk from the mainland to the island. There was testimony that there were no visible workings on these two claims. Two iron-stained outcrops, however, were sampled. The Hillside claim has some trenching. On the January and the Broken Baro claims the workings consist of a dozer cut, several surface workings and short adits. The portal of a 200 foot adit is on the Broken Barrow and its face is in the snip claim. There is evidence on the Banner of a caved adit. The Fresno claim has an old shaft covered over by timbers with no ladder for entry. On the Karan there has been considerable prospecting in cuts across gossan and shale and in a pit. (Tr. 31, 32, 40, 41 and Exhs. 6-5 thru 6-8).

The mineral examiner for the Government testified that when he first examined the claims on December 5, 1961, he was accompanied by Mr. Rodney Wood, Mr. Walter Wood, and District Ranger Scott. He stated that he took samples at places either selected, requested or approved by Mr. Wood, that on the Broken Barrow and the Fresno Mr. Wood could point out no openings or prospect points so no samples were taken from them, that the caved adit on the Banner was not accessible and the dump sample from the latter claim was not assayed for lack of information as to the origin of the material.

We have carefully reviewed the entire record. The testimony and evidence adduced at the hearing is amply summarized in the Hearing Examiner's decision and need not be repeated at length.

The assay reports of the samples taken by the Forest Service mining engineer disclose insignificant values for gold and silver. Those samples which were assayed for manganese show values well below the minimum requirements set for the national stockpiling specifications for manganese at 44% and for metallurgical grade manganese at 46%. While such program was in operation low grade ores of not less than 15% manganese were acceptable provided they could be upgraded to at least 40%. A sample of manganese ore from the Broken Baro claim was sent to the U. S. Bureau of Mines laboratory at Salt Lake City, Utah, with instructions to make the same tests used on low grade ores during the Government's stockpiling program. The results show that the ore submitted was not susceptible of upgrading to the minimum chemical specifications used in the stockpiling program. (Tr. 44-54; Exhibits 5, 7, 8, 9, 11, 12, 13 and 14).

The Forest Service inquired of two users with regard to their purchases of manganese ore. One stated that it is currently using 38% manganese ore and the price per ton is a negotiated matter. (Exh. 17). The other indicated that it had sufficient manganese ore to satisfy its limited needs for an indefinite period. (Exh. 16).

The mineral examiner for the contestant was of the opinion that a prudent man would not be justified in spending time and money in an effort to develop a paying mine. His reasons were that the manganese deposits are of such low value that they could not be mined and marketed at a profit, that it is not the type of manganese that can be upgraded, that as to the iron showings the high silicate content eliminates it from use in the steel industry, that the small copper showing is insignificant, and that the gold and silver values are almost nil. (Tr. 56-58).

Mr. Wallis R. Wood, the only contestee present at the hearing and the contestees' sole witness, testified that his father was the owner of the claims and upon his demise the witness and other sons acquired an interest in them. He stated that he was familiar with the history of the claims from records and personal knowledge. He revealed that manganese had been mined on a claim that is now part of the island and that the shaft that had mining cars running to it is now inundated. He added that he saw workings from 1930 to 1939, but there was no mining activity being conducted. He disclosed that the last mining on the claims was in 1917, that work had discontinued because of lack of priority for manganese during World War I, and that it did not pay to mine the manganese because they had to ship it so far and the smelter had closed down.

Mr. Wood also related that more recently his brother Rodney was advised by a geologist that the values, if any, would be found at depth and that his brothers were financially unable to proceed with the recommended drilling and had asked for his assistance, which he gave. He stated that they started drilling on the Broken Baro claim and went to an estimated depth of 80 feet through a shist formation and shifted to another location on the same claim where the casing was lost. He indicated that the drill was moved across the creek to another claim. Mr. Wood maintained that they are prepared to continue exploration of every outcropping in order to prove value at depth. (Tr. 117-124, 127-128).

The Hearing Examiner's decision explained that official notice was being taken of certain documents of record in the land office at Sacramento, California, pertaining to the withdrawal of the land embraced within the limits of the mining claims in question. Those records disclose that on July 29, 1936 and July 16, 1947, certain land in Sec. 1, T. 33 N., R. 4 W., and on September 2, 1937 certain land in Sec. 36, T. 34 N., R. 4 W., which include the lands in these claims, were withdrawn from all forms of entry by First Form Reclamation Withdrawal orders, pursuant to sec. 3 of the act of June 17, 1902 (43 U.S.C. § 416 (1964)), for the Central Valley Project. 1/ There is nothing in the record to show that the reclamation withdrawals were ever revoked or that the lands involved since the withdrawals have been opened to mineral entry under the act of April 23, 1932 (43 U.S.C., § 154 (1964)).

The Hearing Examiner properly concluded that a discovery of valuable mineral in order to validate a mining claim must be made while the land is open to exploration and purchase under the mining laws. He correctly pointed out that where after a mining claim is located the Government withdraws the land from the operation of the mining laws prior to the time of discovery, the claim has not ripened into a property right entitled to protection, and that a discovery made after the withdrawal of the land from the operation of the mining laws will not validate the location. The Hearing Examiner found, in substance, that the type of manganese ore found on the claims is not susceptible to upgrading so that the mineral would be salable on the present

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1/ The decision below shows the date of the withdrawals as July 6, 1946.

market, that the contestees have not refuted the testimony of the contestant's mining engineer but rely upon the fact that the claims were probably commercially worked sometime in the past, and that the contestees' testimony that they are prepared to explore every outcrop to prove value at depth is an admission that no minable materials presently exist on the claims. He concluded that no discovery of a valuable mineral deposit has been demonstrated on any of the claims.

On appeal the contestees assert that it is their understanding of the mining laws of the United States that when a person locates mineral, he can file on it until it becomes valuable and a market develops and he can mine and sell the mineral.

We do not subscribe to the appellants' interpretation. Under the mining laws, one may take possession of vacant public land open to location under those laws and, after filing notice of location, retain that possession against all except the Government while he is in diligent prosecution of his efforts to discover valuable mineral therein. While he is in possession of the land, he is not regarded as a trespasser because he is on the land with the tacit consent of the Government. However, when the Government withdraws that consent, either by withdrawing the land from the operation of the mining laws or by institution of adverse proceedings against the claims, the mining claimant must show that he had made a discovery of a valuable mineral deposit within the limits of the claim in order to retain his possession. When the Government withdraws the land a discovery after the withdrawal will not serve to validate the claim. United States v. Everett Foster et al., 65 I.D. 1 (1958).

For the mining claimants to be considered as having possessory rights against the Government, they are required to come forward with a preponderance of evidence to establish that the claims were perfected by discoveries in existence on the date of the withdrawals and to the present. J. Everett Nelson, A-29174 (February 4, 1963); United States v. Wilmot D. Everett, et al., A-27010 Supp. (October 17, 1955).

In contesting a mining claim, the Government bears the burden of going forward with sufficient evidence to establish a prima facie case in support of its charge of invalidity. The burden then shifts to the mining claimant to show by a preponderance of evidence that his claim is valid. Foster v. Seaton, 271 F. 2d 836 (1959). There is no obligation upon the Government to make a discovery for a mineral claimant.

In determining whether there has been a discovery of a "valuable mineral" within the meaning of the mining laws, it has long been recognized that there must be evidence of the existence of mineral in such quality and quantity that a person of ordinary prudence would be justified in expending his time and money with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894); Cameron v. United States, 252 U.S. 450 (1920); Best v. Humboldt Placer Mining Co., 371 U.S.

344 (1963). In the case of a lode claim the elements necessary to establish a valid discovery are (1) that there must be a vein or lode of quartz or other rock in place, (2) that the quartz or other rock in place must carry gold or some other valuable mineral deposit, and (3) that the two preceding elements when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine. Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912).

It is not sufficient to constitute discovery that the mineral showings indicate that more exploratory work is warranted. United States v. Clyde Raymond Altman et al., 68 I.D. 235 (1961). Nor is mere willingness to continue exploration a justification for finding that a discovery has occurred. United States v. Melvin L. Nevitt, A-30030 (July 28, 1964). The owner of an unpatented mining claim takes the risk that when his claim is challenged by adverse proceedings it will no longer support the finding of a valid discovery. Cf. Best v. Humboldt Placer Mining Co., supra. The validity of an unpatented claim while it may have been established at one time is not a thing that is established for all time. United States v. LaFortuna Uranium Mines, Inc., A-29852 (May 4, 1964).

The contestees contend on appeal that the effect of the Hearing Examiner's decision would be to cut off access to three other mining claims not involved in this proceeding. The validity of a mining claim was never predicated on the sole fact that it provides access to adjacent or adjoining mining claims.

It is additionally alleged on appeal that the Government's mineral examiner was made aware that the discoveries on the Secret and the Unity claims were in hematite which lay on the surface of the ground by the thousands of tons. They maintain that the tunnels and drifts on these two claims were driven at the lowest point along Cove Creek and they are now covered by the waters of Shasta Lake. The contestees point out that the mineral examiner for the Government mentioned the January, Broken Baro, Broken Barrow, Snip, Banner, Hillside and Fresno claims in a general way, whereas they contend that on these claims there are over 6,000 feet of development work and that there are many tunnels and drifts along Cove Creek that have been caved by water of the lake. It is asserted that the shaft referred to in the mineral examiner's testimony as being on the Fresno is on the Banner and that it is 50 feet in depth rather than 25 feet. It is further contended on appeal that the Forest Service mining engineer was not aware that there are two deposits of manganese on these claims and the one he did not sample has manganese ore that runs to 50% and could be worked at a profit under certain conditions. It is asserted that the Hearing Examiner erred in thinking that the contestees were trying to make mineral discoveries on these claims. They urge that the original location notices and position of the discovery monuments erected by the locators show that they were based upon hematite that is on the surface of the ground. They aver that they are simply trying to find the best place to start mining from the top of the hill as Shasta Lake has covered the long tunnels that run into this body of ore from Cove Creek.

The purpose of a hearing in a Government contest against mining claims is to afford both parties full opportunity to be heard and present their evidence and to cross-examine the witnesses of the opposing party. The record made at the hearing which is the sole basis for decision, except for those matters of which official notice may be taken, fails to disclose any testimony or evidence which supports the contentions of the contestees on appeal set forth in substance, in the paragraph above.

Moreover, the location notices (Exh. 1) for these claims do not designate the mineral for which the claims were located, except that for the Secret which states its mineral is part gold and silver. Therefore, the Hearing Examiner properly based his decision on the uncontroverted and unrebutted evidence introduced into the record pertaining to the subject mining claims.

The contestees have furnished with their appeal exhibits which consist of copies of a letter dated April 5, 1963, addressed to Mr. W. R. Wood by the manager of the Southern Pacific Company, Land Department, stating that certain lands in Sec. 1, T. 33 N., R. 4 W., M.D.M., were held to be mineral in character in 1905; an assay report from Abbot A. Hanks, Inc. dated June 1, 1962, pertaining to a sample submitted by Mr. W. R. Wood: an assay report from Morse Laboratories, dated August 31, 1955, addressed to G. I. Dumond (It has a hand written notation apparently by Mr. Rodney Wood; "Rodney Wood property Deep Pit Group Broken Baro Mine"); an assay report from Mariposa Spectrographic Laboratory, dated February 27, 1962, addressed to Walter S. Wood pertaining to 6 samples fire-assayed for gold and silver; a report on 12 samples assayed for iron content by Inland Analytical Laboratories, Inc., dated October 6, 1961, addressed to Ironex Co.-Bunker Hill Co.; a geology report dated February 1, 1962, on the W$\frac{1}{2}$ Sec. 1, T. 33 N., R. 4 W., entitled "Wood Iron Deposit" by J. R. Evans, mining geologist; an excerpt from the California Department of Natural Resources, Division of Mines, Bulletin 152, pages 267-271, designated Shasta Copper Mine (Pit River Consolidated) by R. R. Morse, July 29, 1918; an undated listing relating to 9 samples not identified with any particular claim; and 6 assay reports made by J. F. Harrigan, analytical chemist and assayer, all dated in 1961 or 1962, pertaining to various samples not identified with any claim or claims.

Concerning the exhibits submitted with the appellants' appeal, it has been held that evidence submitted outside of the hearing cannot be used as a basis for decision on the merits of a case but only to determine whether a further hearing should be held at which the evidence can be properly submitted. United States v. Ed. and Leona Jaensch, A-30225 (April 29, 1965), footnote 1. As was previously stated, the hearing in this case was held on July 23, 1963. Each and every one of these exhibits was in existence at the time of the hearing and apparently could have been offered in evidence at the hearing held. Thus, they may not now be considered as a basis for a further hearing.

The low mineral values shown combined with the fact that the claims have remained either dormant or have not been operated for many years prior to the withdrawal of the lands fail to establish that a discovery existed on each and every mining claim within the meaning of the mining law on the dates the lands were withdrawn and since.

Accordingly, the decision of the Hearing Examiner declaring the Banner Mine, Hillside, Broken Baro, Broken Barrow, Snip, January, Unity, Fresno, Karan, and Secret mining claims null and void is affirmed.

Messrs. Wood are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision the total filing fee will be $50. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving where the decision appealed from is in error.

In the event an appeal is taken the adverse party to be served is:

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Enclosures

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Appeals List No. 1
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Contest No. 066677 (Nevada)

United States
v.
Dolph Bowman, et al.

Approved July 19, 1966

Mining Claims: Common Varieties of Minerals

To satisfy the requirement for discovery on a placer mining claim located before July 23, 1955, for sandstone which has some use in the building and landscaping trades, it must be shown that the material exposed within the limits of the claim has been extracted, removed and marketed at a profit prior to that date, and where such a showing is not made the mining claim is properly declared null and void.

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Administrative Assistant, Hearings

appeal to Sec.
affirmed A-30720 4-13-67

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Mining Claims: Discovery 3413

It is proper to reject a patent application and declare lode mining claims null and void where the evidence presented in a contest proceeding fails to show a discovery of a valuable mineral deposit. Mere hope or belief, however strong it may be, that a valuable deposit of mineral exists within a mining claim, will neither suffice as a discovery thereon nor be accepted as the equivalent thereof.

A mining claimant has the burden of proving in a contest against his claims that a discovery has been made after the Government has made a prima facie case that the claims are invalid for want of a discovery of a valuable mineral deposit.

Mining Claims: Determination of Validity: Government Contests 3400.1, 3482

The issuance of a final certificate on a mining claim does not preclude the United States from inquiry into the validity of the claim at any time before legal title, as evidenced by patent, has passed to the claimant.

United States v. Stephen B. Milisich, Mineral Contest No. Sacramento 043486 (July 22, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 AUG 12 AM 10 00

In reply refer to:
704
Contest No. Sacramento
043486
Mineral Patent Application

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

July 22, 1966

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DECISION

United States of America, Contestant v. Stephen B. Milisich, Contestee	Involving the Independence Nos. 1, 2, 3, 4, 5 and 6 lode mining claims located within Secs. 3 and 4, T. 29 N., R. 10 W., and Sec. 33, T. 30 N., R. 10 W., M.D.M., California (Mineral Survey No. 6469 California), within the Shasta-Trinity National Forest.

Decision Affirmed

Mr. Stephen B. Milisich has appealed from a Hearing Examiner's decision, dated March 16, 1965, which rejected his patent application and declared all of the above captioned claims null and void for lack of discovery of a valuable mineral deposit on any of them.

Mr. Milisich filed the mineral patent application in 1950. This contest proceeding was initiated by a complaint, issued at the request of the Forest Service, U. S. Department of Agriculture, which charged:

(1) The existence of a deposit of valuable mineral of sufficient quantities to constitute a valid discovery is not disclosed within the boundaries of the mining claims.

(2) $500 worth of labor has not been expended or improvements made by the applicant or his grantors upon the Independence Nos. 2, 4 and 6 lode mining claims. 1/

The contestee filed a timely answer denying the charges, and a hearing was held in Redding, California on May 20, 1964.

At the beginning of the hearing the contestee's attorney presented in evidence, as contestee's Exhibit A, a copy of a decision dated June 7, 1951, by the then Manager of the Sacramento Land Office accepting the final proof, issuing the final certificate and approving the mineral entry for patenting. The attorney then made a formal motion for dismissal of the contest proceedings because of the issuance of the final certificate, which motion was denied by the Hearing Examiner (Tr. 6).

1/ The Examiner held that since his ruling on Charge No. 1 was dispositive of the case, it was unnecessary to further consider the merits of Charge No. 2.

A careful review has been made of the entire case record. The Examiner adequately summarized the pertinent evidence. However, in view of the reasons given for the appeal, it is considered advisable to brief the pertinent evidence herein and then to discuss certain portions of the testimony cited by the appellant in his arguments with reference to specific pages in the official transcript of the hearing.

Mr. William Sanborn, a mining engineer employed by the Forest Service, duly qualified as an expert in the field of mining, testified for the contestant. He introduced a copy of the plat of Mineral Survey No. 6469 showing the six claims in the patent application (Contestant's Ex. 1) and the underground workings (Tr. 9 and 10). He introduced contestant's Exhibit 2, which is an overlay which he prepared of the mineral plat showing approximate locations of all samples which he took; on the right of the overlay is a large scale diagram of the underground openings, showing locations of sample points (Tr. 10).

Mr. Sanborn testified that he initially examined the claims on June 12, 13 and 14, 1951 accompanied by a Mr. Wentz who represented the claimant and pointed out places where sampling should be done. He took 18 samples, at places where Mr. Wentz indicated values could be expected to be found, and described the places and method of sampling. The samples were sent to Abbot A. Hanks, Inc. for assay, and the assay report was introduced in evidence as Exhibit 4. He stated that seven samples were taken from the Independence No. 1 claim, five from the lower main adit and samples 6 and 7 from the upper adit; two samples showed merely a trace of gold, one showed no gold, three assayed at $0.17 cents a ton and sample No. 7 assayed $14.70 a ton in gold. He testified that sample No. 7 represented a composite of cuttings across the quartz structure in the upper adit at four points approximating 10 feet apart. One cut was 6/10ths of a foot, one 5/10ths and two were 7/10ths of a foot across the vein; they were combined into one sample and submitted as sample No. 7. Four samples from the Independence No. 3 claim contained no gold on one and only a trace on the other three (Tr. 16). Of four samples from the Independence No. 5 claim, two showed a value of $0.17 per ton, one $0.35 and the other a trace. Three samples were taken from the Independence No. 6 claim, one of which showed $0.70 a ton in gold and no gold was found in the other two. Mr. Sanborn stated that he sampled at all places pointed out by Mr. Wentz and some samples were taken independently (Tr. 19).

Mr. Sanborn further testified that he reexamined and resampled the claims on September 28 and 29, 1952, accompanied by Mr. Milisich, Mr. Cibula 2/ and Mr. Wentz. On September 29, ten samples were cut and submitted to Abbott Hanks; the assay certificate, introduced in evidence as Exhibit 5, shows six samples from the Independence No. 1 claim--one assaying $1.57 a ton, one $0.17 a ton, two only a trace and two indicating no gold found; one of the samples taken in a crosscut in the upper main adit showed no gold found, two were taken in the lower main adit showing no gold found and a trace. Two samples from the Independence No. 5 claim showed only a trace and no gold found; one from Independence No. 4 claim showed a trace and one from the Independence No. 3 claim indicated no gold found.

2/ Mr. Cibula is the contestee's attorney.

He testified further that he reexamined and resampled the claims on March 10 and 11, 1964; that the main purpose of this examination was to satisfy himself as to the valuation evidenced in previous samplings on the Independence No. 1 claim, specifically sample No. 7, supra, which indicated a value of $14.70 a ton; thirteen samples were taken at this time and sent to Abbott Hanks to be assayed for gold and silver. The assay returns on these samples are shown on contestant's Exhibit 6. Two of the samples taken in the lower main adit on the Independence No. 1, assayed a trace in gold and silver on one and nil for gold and a trace of silver on the other. Seven samples were taken on the Independence No. 1 from the upper adit; two of the samples showed nil for gold and a trace of silver, including sample designated AFS 688; AFS 689 showed a value of $4.90 per ton in gold and a silver content of .06 ounce; AFS 690 was $2.45 in gold and .05 ounce of silver; AFS 691 was $4.20 in gold and a trace of silver; AFS 692 was $0.70 in gold and .06 ounce of silver; and AFS 693 was $9.80 in gold and .02 ounce of silver. Mr. Sanborn testified that samples 688 through 693 were taken at approximately 10-foot intervals across the shear zone containing quartz. He stated that in averaging out the value of these six samples, which represented an overall lens strike length of 40 or 50 feet, the weighted average of the samples would amount to $4.44 a ton in gold and $4.49 a ton combined gold and silver, across an average width of 2¼ feet, which actually compares closely with the value indicated by Sample No. 7, supra, which represented composite samples over essentially the same strike length but limited to quartz; and that the width of sample No. 7 approximated the average width--approximately 7/10ths of a foot (Tr. 30). Two of the thirteen samples were taken from the Independence No. 5 and assayed nil in gold and a trace of silver; a sample from the Independence No. 2 and one from the Independence No. 4 both showed nil for gold and a trace of silver. Mr. Sanborn further testified that in his opinion gold values of $16 to $20 a ton would be necessary to permit an economical profitable excavation of gold (Tr. 32), and expressed his opinion that a prudent man would clearly not expend time, effort and money on the claims with the reasonable hope of developing a paying mine.

On cross examination, Mr. Sanborn testified to the nature of his employment with the Forest Service, his findings on the claims in question, his knowledge of other claims in the vicinity and his knowledge of the prudent man rule.

The Government thus established a prima facie case and it was then incumbent upon the contestee to establish the validity of his claims by a preponderance of the evidence. See Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959).

Mr. Milisich, testifying in his own behalf, stated that he acquired the claims from the previous owner, John Kutz, in 1940, 1941 or 1942. He had a Mr. Lee Wentz working on the claims. He further stated that Mr. Wentz took some samples (that Mrs. Wentz told him she dug them out) and turned them over to him and that he (Mr. Milisich) took them to the assayer but he didn't know where the samples came from; "I didn't ask that. All I know, they sent the samples in; I take it for granted they come from the place that I bought, see." (Tr. 74). He testified that he had only been out to the claims four times and that he has taken no samples himself. Assay certificates on these samples, dated in 1946 and introduced in evidence as contestee's Exhibits B, C, D and E, show some high values. He further stated that he was handed two assay reports made in 1939 and 1940 for the previous owner, John Kutz, along with the deed to the claims when he bought them. These assay reports (contestee's exhibits F and G) showed high values. Mr. Milisich did not know where any of these samples came from and no evidence was introduced to show where or how the samples were taken. He testified further that in 1952 he had a Mr. Whealdon go to the claims to take samples and Whealdon had them assayed by Abbott A. Hanks, Inc. The certificate of assay (Ex. H2) shows eight samples; one assayed at $27.74 per ton in gold and silver, another at $1.92 in gold, another $0.35 in gold, one at $0.17 in gold and four samples reflected no value or a trace. Exhibit H1 was also introduced in evidence. This is a paper signed by A. N. Whealdon, which purports to show where these samples were taken; the locations of the samples were indefinite and there is no evidence as to how the samples were taken. In the circumstances, no weight can be given to any of these samples.

Mr. Cibula testified briefly for the contestee as to his knowledge of the claims and their history, but his testimony contained no pertinent probative evidence.

Mr. John X. Murphy, a mining engineer, duly qualified as an expert in the field of mining, testified for the contestee. The Hearing Examiner presented the substance of Mr. Murphy's pertinent testimony on pages 5 and 6 of his decision:

> Mr. Murphy surveyed the Independence group of mining claims for Mr. Milisich. Mr. Murphy testified as to his observations on the Independence group of claims as well as on the adjoining mining claims and said that the formations are promising. He advanced several theories as to why he believes the ground within the Independence group of claims is worthy of further exploration. One reason for this is that the Independence group is in the same location as the Midas Mine which had a good record of production. Mr. Murphy took five samples from the upper tunnel of the Independence No. 1 claim. These samples were assayed by J. F. Harrington, Assayer, and the values shown on the assay certificate, contestant's exhibit No. 13, are insignificant. Two of the samples showed values of $0.35 per ton gold; two showed a trace of gold and in one no gold was found. No silver was found in any of the five samples. Mr. Murphy stated that even though his five samples did not show any values, they are informative as to the general picture of the mine; that the work done previously in many respects was wasted; and that a new approach to explore the mine should be taken.

The Examiner concluded on page 7 of his decision that the most that can be said for the testimony of the contestee and his witnesses is that it shows a hope or a belief that further exploration will disclose valuable veins of ore containing gold, but the hope or belief, however strong it may be, that a valuable deposit exists within a claim, will neither suffice as a discovery thereon nor be acceptec as the equivalent thereof. He cited East Tintic Consolidated Mining Claim, 40 L.D. 271 (1911), 41 L.D. 255 (1912); United States v. Josephine Lode Mining and Development Company, A-27090 (May 11, 1955); United States v. Francis N. Dloughy et al., A-27668 (September 24, 1958).

We concur with the conclusion of the Hearing Examiner. The contestee has failed to prove the validity of his claims by a preponderance of the evidence. Foster v. Seaton, supra. He did not meet the prudent man test of discovery defined in Castle v. Womble, 19 L.D. 455 (1894), which was affirmed by the Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905). The only evidence presented by the contestee that can be given any weight was the testimony of his expert witness, John X. Murphy and it is not favorable concerning the claims. The gist of his testimony was based mostly on geological inference, i. e., geological structure on the claims similar to occurrences on the nearby patented Midas Mine, which at one time produced over $3,500,000 in gold, and on a recommendation that further exploration might uncover values. He took only five samples from the upper adit of the Independence No. 1 claim, three of which were barren of any values and two of which were valued at only $0.35 per ton. He indicated that the $14.70 sample No. 7 taken by Mr. Sanborn from the upper adit of the Independence No. 1 across the shear zone was promising.

In United States v. Emerald Empire Mining Co., A-30445 (December 3, 1965) the Department held (syllabus): "Geological inference cannot be used as a substitute for or mitigating factor in the absence of a finding of sufficient mineral value on the claim involved so as to constitute a discovery." In United States v. John L. Cooper et al., A-30267 (May 11,1965), the Department said: "The Department has held that there is a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. It is only when the exploratory work shows that minerals exist in such quantities and such values that there is a reasonable prospect of success in developing a paying mine that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961). A prudent man may be willing to expend further time and money in exploration in the hope of finding valuable minerals, but such mere willingness is insufficient to establish the presence of a discovery on a mining claim. United States v. Robert Hight et al., A-30256 (April 21, 1965). The discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values. United States v. John L. Cooper et al., supra.

The appellant lists the following reasons for appeal, some of which we have briefed:

(1) The statement of law as set forth by the Hearing Officer does not pertain to the true facts of the case as reflected in the written transcript of the testimony adduced at the hearing.

(2) The conclusions reached by the hearing officer are incorrect and not justified when considered in the light of the true over-all facts which were adduced and testified to at the hearing.

(3) The hearing officer could not have considered and taken into consideration all of the evidence adduced at the hearing as certain testimony adduced and favorable to the contestee is unrefuted and must be taken as correct and must have been entirely disregarded in determining the case adversely to contestee.

(4) The hearing officer relied almost solely and entirely on the testimony of Mr. Sanborn, disregarding entirely the true situation that Mr. Sanborn is an employee of the Forest Service which has refused to give its consent to a patent being issued to contestee and quite obviously disregarding the testimony of Mr. John X. Murphy, a mining engineer and United States Mineral Surveyor, who testified for contestee.

(5) The hearing officer erred in dismissing the motion of contestee to dismiss the contest action.

The first two reasons are not meritorious; they are mere generalizations and are not borne out by the record and the Examiner's decision as indicated in our discussion above. Conceding that certain testimony was unrefuted, the record shows that no unrefuted testimony presented by the contestee was material or particularly favorable to the contestee's case. On the contrary, the unrefuted testimony consisted mostly of geological theory or inference, as hereinbefore pointed out. More specifically, the appellant argues that the Mineral Survey plat proves very extensive and expensive underground works which are indicative of the existence of valuable mineral deposits of sufficient quantities not only to constitute a valid discovery but also to prove that there must have been a valuable discovery, further, that the extent of the underground workings is ample proof of the fact that there already has been expenditure of time and money in the effort to develop the mines from their initial inception. There is no denial of the existence of extensive underground workings on the claim; in fact, the contestant's expert witness testified to this fact himself; but the existence of underground workings is no proof of the existence of a valuable mineral deposit. Admittedly, such workings are ample proof of a great expenditure of time and money in the effort to find minerals, but this also is no proof of an existing discovery. The evidence is conclusive that there is no discovery on the claims at the present time. A mining claim will be declared null and void where, although the claim may have possibly been valuable for minerals in the past, it is not shown as a present fact that the claim is valuable for minerals. See United States v. David L. and Kathryn King, A-30217 (December 29, 1964). This case also holds that a mining claim is properly declared null and void where the evidence shows only nominal gold values are present on the claim.

Appellant further contends that the contestant's expert witness introduced Exhibits 7 through 11, which are a group of photos showing extensive workings and veins and outcrops; that these photos and testimony concerning same are particularly significant when considering the geographic location of these claims with respect to the fabulous Midas Mines; and that according to the testimony of both mining engineers the character and content of soil and rock is approximately the same on the two groups of claims, citing the testimony of mining engineer John X. Murphy commencing on page 97 of the transcript and particularly his testimony on pages 101, 102 and 103.

Again this testimony is substantially geological inference without any evidence of the existence of valuable minerals sufficient to constitute a discovery. In Mr. Murphy's testimony on pages 101, 102 and 103 of the transcript, he affirmed Mr. Sanborn's testimony as to the value of gold which had been taken from the Midas Mine near the claims in question. He testified to the similarity in the geology of the claims; stated that on the Independence claims in the underground workings you find stringers of calcite, which look like quartz at a cursory examination but on testing they are calcite which is a metamorphic form of limestone; that he also found a thin coating of . lime which, in some places, is starting to form small stalactites. He further testified that basically the rocks on the claims are the phyllite, the calcite and siliceous material and one of the best places for deposition of gold is on the cake of the shale and the limestone. He regarded what he found as very promising, stating that you look for a contact between these two types of rock, and "Under certain conditions, why, you will find gold. Not all the time." He further stated (Tr. 105): "I believe that the structure there would probably turn out to be these arches of phyllite in a contact of limestone next to it, which would be a good place to look for a deposition of ore." He stated that whoever was driving the upper adit went right through their mineralized area and got in the phyllite and calcite which is the same thing as the lower tunnel; that a good portion of the adit was in waste rock and they didn't follow the ore which was the mistake they made. Asked where he thought the ore is, he replied "Well, it's certainly in that shear zone, if my theory is correct. If a crosscut was driven to intercept the shear zone, he thought you would get more information; more sampling and get a better idea of what happened." Mr. Murphy further testified (Tr. 109 and 110) that he considered the evidence sufficient to consider exploration and continue spending money. He said the samples introduced by Mr. Sanborn were very promising and they were obtained practically at grass roots. He thought the Midas Mine is 1400 feet deep and "You are finding good values close to the surface. I certainly think it's worthwhile exploring further." He thought the mine has possibilities because it is in the same location as the Midas Mine, which has a good record of production, "stating of course, that has qualifications, but you certainly, it's encouraging that it's right next to it. Secondly, the lithological sequence is favorable, I mean by that, you have the shale and the limestone; you have the folding which would form the trough or the catch basin. These dikes which could be the host rock or the introducing factor for mineralization, and you also have this one mineralized area that has been called a shear zone here that has fairly good values." Thus this testimony is primarily theory and what might possibly be found and the thought that further exploration might be worthwhile.

The statements in appellant's reason No. 4 are bald allegations unsubstantiated by the record and not supported by any evidence.

Contrary to the appellant's contention the Hearing Examiner was not in error in dismissing the motion of the contestee to dismiss the contest action because the final certificate had already been issued by the land office manager. The issuance of a final certificate on a mining claim does not preclude the United States from inquiry into the validity of the claim at any time before legal title, as evidenced by patent, has passed to the claimant. See United States v. Ralph S. Atkinson, A-29028 (September 11, 1962); United States v. John Olson et al., etc., A-29953, A-29958 and A-29969 (April 13, 1964).

Accordingly, the Hearing Examiner's decision of March 16, 1965 is hereby affirmed.

Mr. Stephen B. Milisich is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all six claims adversely affected by this decision the total filing fee will be $30. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken, the adverse party to be served is:

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U. S. Department of Agriculture
630 Sansome Street
San Francisco, California 94111

John B. Piccolo
Acting Chief,
Office of Appeals and Hearings

Enclosures 2

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Multiple Mineral Development: Act of July 23, 1955 - Surface Uses 3512.1

In a proceeding under section 5 of the act of July 23, 1955, to determine the rights of a mineral claimant to the surface resources of his mining claim, a mineral claimant is required to prove that there is within the limits of his claim on the date of the act a valid discovery within the meaning of the mining law to prevent its being subject to the limitations and restrictions of section 4 of that act.

Multiple Mineral Development: Act of July 23, 1955 - Generally 3510

A Government mineral examiner investigating a mining claim prior to a proceeding under the act of July 23, 1955, has no duty to seek a discovery or to rehabilitate the discovery points for the mining claimant for it is the duty of the mining claimant to keep the discovery points open for inspection.

United States v. Elmer E. Clark, et al., Sacramento PL 79-2 (August 10, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 AUG 22 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Sacramento PL 79-2

August 10, 1966

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DECISION

United States
v.
Elmer E. Clark, Margaret Clark
and B. M. Clark,
Mining Claimants

Proceedings under the act of July 23, 1955 (P. L. 167), involving the Spread Eagle placer mining claim situated in Secs. 27 and 28, T. 9 N., R. 14 E., M.D.M., El Dorado County, California.

Decision Affirmed

The above-named mining claimants have appealed from the Hearing Examiner's decision, dated September 24, 1964, holding the Spread Eagle placer mining claim subject to the limitations and restrictions specified in section 4 of the act of July 23, 1955 (30 U.S.C. 612 (1964)), for lack of discovery of a valuable mineral deposit within the limits of the mining claim.

Section 4 of the act provides, inter alia, that rights to mining claims thereafter located on public land under the mining laws shall be subject, prior to the issuance of patent, to the right of the United States to manage and dispose of the vegetative surface resources and to manage other surface resources, except mineral deposits subject to location under the mining laws. Section 5 (30 U.S.C. 613 (1964)) sets out the procedure whereby mining claims located before July 23, 1955, may be subjected under certain circumstances to the provisions of section 4. As provided in the procedure, mining claimants may assert that they have the right to such surface resources by filing a verified statement within 150 days after first publication of notice to mining claimants. To establish any right to the surface resources, a mineral claimant must prove that he has made a valid discovery within the meaning of the mining laws on his mining claim prior to July 23, 1955, the date of the act. United States v. Payne, 68 I.D. 250 (1961).

Mr. Elmer E. Clark filed a verified statement asserting rights as to the unpatented Spread Eagle placer claim, pursuant to the published notice to mining claimants. The notice of hearing stated that the United States, through the Forest Service, would offer evidence to prove that a discovery of valuable mineral has not been made within the limits of the claim. A hearing was held on June 26, 1964.

The mining claimants contend on appeal that there is no substantial evidence in the record to support the decision of the Hearing Examiner and it is, therefore, erroneous as a matter of law. It is also asserted that the claimants and their witness, Lee G. MacCleane, testified that the appellants have complied with Sections 22 and 35 of Title 30 of the United States Code in that the evidence was to the effect that a discovery was made and it was valuable. It is argued that where an expert, referring to the Government's mining engineer and witness, testifies that he took samples in places other than where the mining claimants stated their discovery was located, his testimony is worthless and of no consequence in determining whether a discovery had in fact been made. On appeal a request was made for a further hearing and assignment of the case to a Field Commissioner.

The mining claim was located by the mining claimants on April 22, 1949, and the location notice was amended to correct the description on February 8, 1960. The claim is in the Eldorado National Forest south of the Caldor Ranger Station. (Exh. 3)

Geologically the claim was described as the remains of a flat-topped ridge blanketed at one time by volcanic material which has been partly removed by erosion to the point that the basement bedrock is exposed. This is evidenced in the southwestern corner of the claim in a road cut and elsewhere. The basement rock is granite in which there is considerable variation in hardness and degree of weathering. In the old workings, this particular formation was deeply weathered and the drains that were cut and started were deepened to several feet below the horizon of the bedrock. This was because the bedrock was so soft. As one goes north the bedrock rises. In the vicinity of the old workings northeast of the cabin the bedrock actually tips to the north. How far this trend extended was not observed. The adits which apparently penetrated the particular area at one time are closed as a result of caving. To the west of this old area of working is another bedrock adit driven at least 50 feet into decomposed granite rock that has caved considerably. In the southeast corner of the claim is another bedrock adit driven into a bank which is closed to within 20 feet of the back of the old timbers. Generally, in most areas of the workings there is considerable timber growth, fairly sizable, many of the trees 50 years old or older. The bulk of the workings shown on Exhibit 4 are workings from the very early days. No place was found on the claim considered to be a recent working, i.e, within the last five years. (Tr. 19-22).

The mining engineer for the Forest Service examined the claim in question on October 17, 1963, and on June 16, 18, 19, and 25, 1964. He testified that on his first visit to the claim Mr. Clark pointed out to him the main places where activity was carried on in the past as well as his present exploration effort and generally the position of the southeast corner of the claim. He added that on that occasion when he asked Mr. Clark if there was any available opening from which he could get a representative sample, he received a negative response. No samples were taken on that visit. The mineral examiner stated he again examined the claim in June 1964, when he made excavations and took samples and reconstructed the features of the claim on a sketch map, Exhibit 4. He indicated the three points of sampling thereon with a red X. He explained that between October 1963 and June 1964 according to his observations there had been no excavations made in any banks from which he could obtain samples, nevertheless he himself endeavored to find gravel by excavating into the old banks. He revealed that at the place of his most southerly sampling he found a little run of gravel in the volcanics, measuring a few inches thick that was actually fine gravel with some quartz metamorphic rocks in it. He testified that the samples were panned down and the resulting concentrates including the gold therein were taken to an assayer for free gold determination by amalgamation and for a fire assay of the tailings. The free gold content was 3.16 milligrams and the indicated value of the fire assay of tailings according to the assay report was 35 cents a ton. The Forest Service mineral examiner pointed out that in the conversion of the 3.16 milligrams with reference to the number of pans of material taken, the indicated value is 6 cents a cubic yard for the general sampling. He indicated that values in the amalgamation tailings would not be recoverable by amalgamation or normal placering operations and the cost of smelting would be many times the value recovered. He estimated that operating costs to remove the free gold by surface mining would be in excess of 50 cents a cubic yard and that underground mining it would not be less than $4.00 a yard. He concluded from his observations and sampling that a prudent man would not be justified in expending his effort and money in the hope of developing a paying mine. (Tr. 10-11, 15, 22-28). On cross-examination he emphasized that his samples were taken off the bedrock. (Tr. 30).

As was pointed out in the Hearing Examiner's decision, Margaret Clark, Lee G. MacCleane and Billy Elmer Clark, all testified for the mineral claimants that at some time prior to 1949 some gold was removed from the claim. The Hearing Examiner held that the evidence presented by the mining claimants falls far short of that which is required of them to show a discovery of a valuable mineral on the claim as would sustain a patent application and as a result he declared that the claim was subject to the terms and limitations of section 4 of the act of July 23, 1955. In United States v. Payne, supra, the Department fully explained that in a section 5 proceeding this was the proper standard to be applied.

It is the duty of a mining claimant to keep his discovery points open for examination by Government mineral examiners, who are under no obligation to open caved workings. United States v. Elizabeth D. Houston, A-30395 (September 9, 1965). The Forest Service mining engineer examined and sampled the mining claim as best he could without the cooperation of Mr. Elmer E. Clark in designating any available opening wherein a representative sample could be obtained. There is no obligation on the part of the Government to make a discovery for a mineral claimant. The Government made a prima facie case at the hearing that no discovery had been made on the Spread Eagle claim. The appellants have not presented any substantial evidence to overcome the prima facie case.

It is provided in 30 U.S.C. § 22, in pertinent part, that except as otherwise provided, all valuable mineral deposits in lands belonging to the United States shall be free and open to exploration and purchase. Section 35 of Title 30, United States Code, in pertinent part, provides that mining claims usually called "placer," including all forms of deposits, excepting veins of quartz or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims. The mining law requires a discovery of a valuable mineral deposit to validate a mining claim but does not define "discovery." However, the standard applied by the Department in Castle v. Womble, 19 L.D. 455 (1894), was expressly approved by the United States Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905), and was reaffirmed most recently in Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963). The standard is that:

> *** where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

Where the value of the gold found is so slight in relation to the cost of extracting it that a person of ordinary prudence would not be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine, there has not been a valid discovery within the meaning of the mining laws. United States v. August Herman, A-30336 (July 30, 1965).

While the mining claimants' witnesses testified that some gold was removed from the claim prior to 1949, no evidence was introduced into the record to explain the amount of gold removed, the quantity of material worked to obtain that gold and the quantity of such material remaining at the place from which it was removed. The bare testimony that gold was removed from the claim without evidence of these other factors is meaningless and has no evidentiary value.

Upon review of the testimony in the record it is concluded that the evidence clearly establishes that although the claimants may have found some gold on the claim, they have not shown that they had found a valuable deposit of gold prior to July 23, 1955, that would justify development work within the meaning of the mining laws. Since the evidence sustains the conclusions of the Hearing Examiner that no discovery existed within the limits of the Spread Eagle claim on July 23, 1955, the claim was properly declared to be subject to the limitations and restrictions of section 4 of the act of July 23, 1955, supra.

Accordingly, the decision of the Hearing Examiner is affirmed.

This decision does not preclude the mining claimants from attempting to develop the claim under the mining laws, subject to the limitations and restrictions specified in section 4 of the act of July 23, 1955, supra, which include the right of the United States prior to patent to manage and dispose of the vegetative resources on the lands embraced in the claim and to manage other surface resources thereof.

The appellants request a further hearing and assignment of the case to a Field Commissioner. As provided in section 5c of the act of July 23, 1955, supra, the procedures for the conduct of a hearing thereunder are to follow the established procedures and rules of practice of the Department of the Interior in respect to contests and protests. Departmental regulations governing proceedings for contests and protests are contained in 43 CFR Subpart 1852 and provide for a hearing before a Hearing Examiner which is conducted in accordance with the Administrative Procedure Act, 60 Stat. 237 (1946); 5 U.S.C. § 1001-1011 (1964). The proceedings in this case were conducted as prescribed by statute. Consequently, the case cannot be assigned to a Field Commissioner for a hearing under the regulations which provide for hearings in noncontest cases. Moreover, even if a request were made for a further hearing before a Hearing Examiner, it also would be denied for the reason that the request was not supported by any evidence relating to a discovery which could be examined and considered to determine whether it affords a basis for ordering a further hearing. United States v. Gilbert C. Wedertz, 71 I.D. 368 (1964).

Mr. Elmer E. Clark, et al., are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

In the event an appeal is taken the adverse party to be served is:

Regional Attorney
Office of the General Counsel
U. S. Department of Agriculture
630 Sansome Street - Room 860
San Francisco, California 94111

John B. Piccolo
Acting Chief, Office of Appeals
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Enclosures

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OPD
Gower Federal Service
Appeals List No. 1
WHW

appeal to Sec
affirmed A-30729
5-31-67

DOCKET FILES

Mining Claims: Determination of Validity 3400.1

No hearing is necessary to declare mining claims void ab initio where the records of the Department show that at the time of location of the claims the land was not open to such location.

The Administrative Procedure Act does not require the holding of hearings in mining cases where the facts are not in dispute and the validity of a claim presents solely a legal issue.

When title to lands embracing mining claims is in the United States, the Department of the Interior has jurisdiction to make an administrative determination as to the validity of such claims.

Dorothy L. Benton, Sacramento 080166 (August 17, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 AUG 25 AM 10 00

In reply refer to:
704
Sacramento 080166

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

August 17, 1966

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Dorothy L. Benton, : Involving the Betty Nos. 1 and 2
Mining Claimant : placer mining claims located
: within the SE$\frac{1}{4}$ sec. 16, T. 46
: N., R. 7 W., M.D.M., Siskiyou
: County, California, within the
: Klamath National Forest.
:

Decision Affirmed

Mrs. Dorothy L. Benton has appealed from a decision of the Sacramento, California, land office, dated January 19, 1966, which declared her Betty Nos. 1 and 2 placer mining claims null and void ab initio because the lands were withdrawn from mining at the times the claims were located.

A search of the Siskiyou County records by the Forest Service, U. S. Department of Agriculture, revealed that the claims were located in January and February 1929, when the said SE$\frac{1}{4}$ of Section 16 was embraced in Power Site Reserve No. 258.

Power Site Reserve No. 258 was created by Executive Order of April 13, 1912, under authority of the Act of June 25, 1910 (36 Stat. 847). That act, which was later amended by the Act of August 24, 1912 (43 U.S.C. § 142), provided that lands withdrawn thereunder shall be open to operation of the mining laws as to certain minerals only. However, the Federal Power Act of June 10, 1920, and specifically section 24 thereof, prohibited locations for all kinds of minerals in such reserves (16 U.S.C. § 818). See also 43 CFR 2022.1. Thus the land involved was withdrawn from all mining locations in 1929 when the claims were located. A valid mining claim could not be located on lands previously reserved for power sites under the Federal Power Act of June 10, 1920 until a determination by the Federal Power Commission that the value of the land will not be injured or destroyed for the purposes of power development by such location. See Coeur D'Alene Crescent Mining Company, 53 I.D. 531 (1931).

Pursuant to a determination by the Federal Power Commission, a portion of the land on which the subject claims were located--namely, Lot 11 of said Section 16--was restored from Power Site Reserve No. 258, effective October 1, 1935, subject to the terms and conditions of Section 24 of the Federal Power Act, supra.

The substance of the appellant's reasons for appeal is as follows:

(1) The Fifth Amendment of the United States Constitution requires that the Federal Government shall observe procedural due process of law. Due process requires notice, opportunity to be heard, opportunity to present evidence, and further requires that the controversy be at issue.

(2) Had she been given opportunity to present evidence she would have presented a certificate of title showing that the subject property is vested in her.

(3) She would have presented evidence that the Federal Power Commission determined the validity of the mining claims on April 4, 1935, at the request of her father and the former owner of the claims, over the objection of the Forest Service; that the claims have been declared valid by a competent legal authority after a hearing conducted in accordance with the requirements of due process of law; and that she bases her position upon full compliance of existing mining laws and all records, documents and papers heretofore presented before the Federal Power Commission.

(4) There are many additional reasons which will be presented if the opportunity is given her.

None of the appellant's contentions has merit or validity with respect to the case before us.

(1) Congress set forth procedural requirements governing administrative proceedings before administrative agencies of the Federal Government in the Administrative Procedure Act (5 U.S.C., 1964 ed., § 1001 et seq.) However, the Department has held that no hearing is necessary to declare mining claims void ab initio where the records of the Department show that at the time of location of the claims the land was not open to such location. The Administrative Procedure Act, supra, does not require the holding of hearings in mining cases where the facts are not in dispute and the validity of a claim presents solely a legal issue. See The Dredge Corporation, 64 I.D. 368 (1957) and supplemental decision on The Dredge Corporation, 65 I.D. 336 (1958), which decisions were affirmed by the United States Court of Appeals for the Ninth Circuit in The Dredge Corporation v. Penny, No. 19, 965 (May 23, 1966).

(2) The certificate of title that the appellant would present at a hearing showing title to the claims vested in her would serve no useful purpose. There is no dispute that the lands are unpatented. The county records disclose that possessory title is claimed by the appellant and this proceeding is based on that understanding.

(3) The Federal Power Commission has no authority to determine the validity of unpatented mining claims. In United States of America v. Grace E. Hutchins et al., Contest Nos. 0170969-C-3 and C-4 (Riverside) (January 8, 1965), the Department held (syllabus): "When title to lands embracing mining claims is in the United States, the Department of the Interior has jurisdiction to make an administrative determination as to the validity of such claims."

The determination made by the Federal Power Commission on April 4, 1935 undoubtedly refers to proceedings by that Commission on a petition filed by Mrs. Benton's father and the former owner of the claims with the Commission for restoration of the lands from the power withdrawal, and which led to the October 1, 1935 restoration of Lot 11 of said sec. 16 subject to the terms and conditions of Section 24 of the Federal Power Act, supra. It could have had nothing to do with determining the validity of the claims in question.

(4) The appellant did not specify the many additional reasons which she would present if the opportunity is given her for a hearing.

The land office decision is correct, and it is hereby affirmed.

Mrs. Dorothy L. Benton is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers both claims adversely affected by this decision the total filing fee is $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

Dist. on page 4

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Div. of L&M S&T (4)
Div. of L&M PM (2)
Gower Federal Service
OPD
Appeals List No. 1
PLS

appeal to Sec
dismissed A-30739
12-28-66

Mining Claims: Determination of Validity 3400.1

It is not sufficient to show that a mining claim may have been worked at some previous date; to constitute a discovery the existence of present values on the claim sufficient to meet the discovery test must be demonstrated.

Mining Claims: Discovery 3413

The time-honored test for a valid discovery is that the known conditions must be plainly such as to engender the belief that the land contains mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end.

Mining Claims: Lands Subject to 3400.1

Under the mining laws of the United States one may take possession of vacant public land open to location under those laws and, after filing notice of location, retain that possession against all except the Government while the mining claimant is in diligent prosecution of efforts to discover valuable minerals therein, but, when the Government institutes adverse proceedings against the claim the owner must show that he has made a discovery of valuable mineral deposits within the limits of the claim in order to retain possession.

Hearings Procedures: Proceedings before the Examiner 1852.3

In no case will a request for postponement of a hearing served or filed less than 10 days in advance of the hearing, or made at the hearing, be granted unless the party requesting it demonstrates that an extreme emergency occurred which could not have been anticipated and which justifies beyond question the granting of a postponement.

United States of America v. Martin A. Harmon et al., Sacramento Contest No. 078865-C-1 (September 15, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 SEP 21 PM 3 24

(3)

Copy in case

DOCKET FILES

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Sacramento Contest
No. 078865-C-1

September 15, 1966

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DECISION

United States of America, Contestant,	:	Big Blue, Gila, and Honey Bee lode mining claims located in secs. 3 and 10, T. 19 N., R. 6 E., M.D.M., California, partially situated within the Plumas National Forest.
v.	:	
Martin A. Harmon, Barbara J. Harmon, Ronald A. Harmon, and Harold T. Harmon, [1] Contestees-Appellants.	:	

Decision Affirmed;
Request for Further Hearing Denied.

The above-named appellants have appealed from the Hearing Examiner's decision dated August 6, 1965, determining the above-identified mining claims null and void for the reason that no valid discovery within the purview of the general mining laws has been made within the boundaries of any of the claims, and the lands embraced within the claims are nonmineral in character.

A hearing was held before the Hearing Examiner on April 20, 1965. The Government was represented by the Office of the Regional Solicitor (Sacramento), United States Department of the Interior. Mr. Ronald A. Harmon appeared at the hearing personally and on behalf of the other claimants.

On appeal the appellants assert that the Hearing Examiner erred in denying Harmon's request at the beginning of the hearing that the mining claimants be allowed a postponement of the hearing in order that they might have time to employ counsel and prepare a showing (Tr. 4-6). Departmental regulation,

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[1] The contest complaint named Mr. Martin A. Harmon and Mrs. Barbara J. Harmon, husband and wife, as the contestees. Subsequently, Messrs. Ronald A. Harmon and Harold T. Harmon (father and brother, respectively, of Martin) have joined with the contestees as appellants in the appeal, and the appellants, through their agent, informed this office on March 29, 1966, that Martin A. Harmon and his wife were in the process of quitclaiming the mining claims to Ronald A. and Harold T. Harmon.

43 CFR 1852.3-3, in pertinent part provides:

> . . . In no case will a request for postponement served or filed less than 10 days in advance of the hearing or made at the hearing be granted unless the party requesting it demonstrates that an extreme emergency occurred which could not have been anticipated and which justifies beyond question the granting of a postponement.

The appellants did not request a postponement prior to the day of the hearing, and, in their appeal, make no showing that there was an emergency warranting the requested postponement as contemplated by the cited regulation. At the hearing, Mr. Harmon testified that he was seeking the postponement for the reason that the attorney he sought to represent the mining claimants at the hearing was not available when the mining claimant telephoned him the morning of the hearing. The hearing was held in Oroville, California, and the attorney's law offices were in Auburn, California. Moreover, Mr. Harmon testified that the sought attorney had been unavailable for three weeks immediately prior to the hearing and he never had employed counsel. (Tr. 4-5). The case file shows that Martin and Barbara Harmon were each served with copies of the notice of time and place of the hearing over one month prior to the day of the hearing, and from the testimony of Mr. Harmon it is clear that the parties knew the attorney they sought was unavailable at least three weeks prior to the hearing, yet no postponement was requested until the hearing. Such a showing is not the required unanticipated emergency within the purview of the quoted regulation. Under the facts shown, the claimants had ample time in which to seek a postponement more than 10 days prior to the day of the hearing. Thus the mining claimants' failure to timely request a postponement is their own action. Cf. United States v. Ernest Higbee et al., A-30348 (August 26, 1965). The Hearing Examiner properly denied the request for a postponement of the hearing.

At the hearing, recorded location notices (Exhs. 2a, b and c) were admitted in evidence showing that each of the mining claims in issue was located on July 1, 1949, by L. E. and Hazel Sparks, alleging the discovery of gold and silver bearing veins.

A mining engineer employed by the Bureau of Land Management (Tr. 6) testified that the lands embraced in the mining claims are under consideration for recreational development (Tr. 9), and that he examined the claims (Tr. 9, 11-12, 15, 24) accompanied on occasion by Mr. Ronald A. Harmon (Tr. 9) and at other times by Mr. Martin T. Harmon (Tr. 11, 15). The witness testified that Martin Harmon informed him that gold was the valuable mineralization on the claims, but that the quartz "might" have possibilities as building stone (Tr. 9). The mining engineer found several old mine workings on the claims (Exh. 4), most of which were in existence in 1917 (Tr. 16) as a result of explorations on earlier claims involving parts of the same lands (Tr. 10-11, Exh. 4). All of the workings on the subject mining claims are old (Tr. 22), and the Bureau's mining engineer found no machinery, tracks or practical improvements on the claims (Tr. 16).

The mining engineer testified that he removed samples from areas showing mineralization, especially where there were mine workings (Tr. 12-20), and that he had the samples assayed. There are two vein systems exposed, one system extends from the Honey Bee claim onto the Big Blue claim, and the other vein system is exposed at points on the Big Blue and Gila claims (Tr. 12).

A channel sample taken across the entire length of a 20 inch quartz vein exposed in a bulldozer cut on the Big Blue claim had an assay value of $3.85 per ton gold and 70 cents per ton silver (Tr. 13, Exhs. 6). A chip sample taken from the same vein system on that mining claim as exposed in an almost completely caved-in 75 foot adit had an assay value of only 88 cents per ton gold and from five to six cents per ton silver (Tr. 13-14, Exh. 6). A sample taken from an 18 inch vein exposed in a 12 foot shaft on the claim had an assay value of 53 cents per ton gold and no silver (Tr. 20, Exh. 5).

On the Honey Bee claim he found two untimbered, caved-in shafts. A vein could be seen in a shaft, but Mr. Martin Harmon informed the mining engineer that the shafts are not accessible and there is no way to inspect the vein at this point. The workings are approximately 30 years old. (Tr. 14-16).

A sample removed from a two foot wide quartz vein exposed on the Gila claim had an assay value of 18 cents per ton gold and no silver (Tr. 17, Exh. 6). A sample taken from a 2½ foot thick blanket or flat line quartz vein exposed on this claim had an assay value of 35 cents per ton gold and 12 to 15 cents per ton silver (Tr. 18, Exh. 6).

The expert witness testified that, based upon his examinations of the subject mining claims, he is of the opinion that there is no showing of exposed mineral of sufficient quantity and quality to justify a person of ordinary prudence in expending further time and money with a reasonable expectation of developing a valuable mine (Tr. 23).

Mr. Ronald A. Harmon, the only other witness at the hearing, testified that he is not an expert in mining or geology (Tr. 28), and that the owners of the claim have no personal knowledge of there having been an expert mineral examination of the claims other than that made by the Bureau's witness (Tr. 26). Mr. Harmon testified that he considered significant the fact that there are old mine workings on the claims. The witness also testified that quartz fireplaces have been made from material that appeared to him to be similar to that found on the mining claims (Tr. 27), but failed to offer the necessary showing as to the quantity or quality of such mineral found on the claims.

The showing made by the mining claimants at the hearing does not meet the time-honored test that the known conditions must be plainly such as to engender the belief that the land contains mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. See John M. DeBevoise, 67 I.D. 177, 179 (1960) and the cases cited therein. Moreover, as to the inaccessible old mine workings, it is the duty of the mining claimants whose claims are being contested to keep discovery points available for inspection by the Government mining examiner, and that examiner has no duty to rehabilitate discovery points or to make a discovery for the claimants. United States v. Ford M. Converse, 72 I.D. 141, 152 (1965). At the contest hearing, after the testimony of the Bureau's mining engineer had clearly established a prima facie case that each mining claim is invalid for want of the discovery of a valuable mineral deposit thereon, the mining claimants had the burden of proving by a preponderance of the evidence that there was a valid discovery. See United States v. Robert Hight et al., A-30256 (April 21, 1965). The mining claimants failed to offer a showing of discovery at the hearing.

On appeal the appellants do not refute the findings of the Hearing Examiner as to the inadequacy of their showing at the hearing, but reiterate a belief that the property has value as a mine in view of past workings. But the Department has stated in United States v. Bee Lambert Barnes, A-30506 (March 28, 1966), that to constitute a discovery it is not sufficient to show that a claim may have been worked at some previous date, because the existence of present values on each claim sufficient to meet the discovery test must be demonstrated.

The appellants state on appeal that further work on the claims may reveal minerals in valuable quantities. Under the mining laws of the United States, one may take possession of vacant public land open to location under those laws and, after filing notice of location, retain that possession against all except the Government while the mining claimants are in diligent prosecution of efforts to discover valuable deposits thereon, but, when the Government withdraws its consent to such location by the institution of adverse proceedings against the mining claims, the owners must then show that they have made a discovery of valuable mineral deposits within the limits of the claim in order to retain possession. See United States v. Harold Dale, A-30465 (January 20, 1966). The mining claimants were required to show a valid discovery of valuable mineral deposits on each claim at the hearing, and this they failed to do.

The appellants request a further hearing in order that they may submit a showing of a valid discovery on each mining claim in issue. See 43 CFR 1852.3-9. In support of their motion, the appellants have submitted an agreement dated June 14, 1965, between Ronald A. Harmon and one Lee Merritt whereby, in substance, Mr. Harmon agreed to deliver to Mr. Merritt 20 tons of quartzite silica from the mining claims in issue by August 1, 1965, 20 additional tons by September 1, 1965, and 20 tons or more thereafter as ordered at a price of $10 per ton plus any gold value in the material delivered to be estimated by a sample assay agreed to between the parties for each 20 ton load. The agreement was entered into after the contest hearing so such evidence could not have been offered at the hearing. However, in the absence of evidence at the hearing of a valid discovery of a valuable mineral deposit within the boundaries of the mining claims, the subsequent showing that a third party after the hearing became interested in purchasing a few tons of the quartzite silica is not a sufficient showing to warrant a further hearing.

The appellants state that they plan to explore the claims "to prove to their own satisfaction the mineral value of the land within the locations under contest." The Department has held that a case cannot rest upon a hope that further exploration will uncover greater values than are now known. See United States v. J. S. Devenny, A-30031 (June 19, 1964). It follows that such a showing is insufficient to warrant a further hearing since in the absence of a showing that the mining claimants have additional substantial evidence not previously offered at the hearing, which through no fault of their own could not have been offered at that time, there is no merit in remanding the proceedings for a further hearing. Cf. United States v. Lucetta A. Hunt et al., A-28189 (February 29, 1960); United States v. G. C. (Tom) Mulkern, A-27746 (January 19, 1959).

The appellants concede that they are not prepared to submit a showing of a valid discovery on any of the mining claims at this time. The parties have been allowed additional time in which to submit such a showing, and now all of the evidence available has been reviewed.

Accordingly, the decision of the Hearing Examiner declaring each of the mining claims null and void for lack of a valid discovery is affirmed, and the appellants' motion for a further hearing is denied. The finding that there has been no valid discovery on any of the mining claims is dispositive of the case, and it is unnecessary to consider, as the Hearing Examiner did, whether the lands are mineral or nonmineral in character.

Messrs. Martin A., Ronald A. and Harold T. Harmon, and Mrs. Barbara J. Harmon are allowed the right of appeal to the Secretary of the Interior from this decision in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. Thus, if the appeal includes all mining claims adversely affected by this decision, the total filing fee is $15. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellants will have the burden of showing wherein the decision appealed from is in error.

If an appeal is taken by Messrs. and Mrs. Harmon, the attorney for the adverse party who must be served is:

Office of Regional Solicitor
United States Department of the Interior
Post Office Box 21-4527
Sacramento, California 95821.

John B. Piccolo

Acting Chief, Office of Appeals and Hearings

Enclosures 2

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Mr. A. Harmon
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Regional Forester, Forest Service, California Region, United States Department of Agriculture, San Francisco, California
Forest Service, United States Department of Agriculture, Division of Watershed Management, Washington, D. C. (12)
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Hearing Examiner Rudolph M. Steiner (Sacramento)
Administrative Assistant, Appeals and Hearings
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Div. of L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
JHO'D

DOCKET FILES

Appeals Procedure: Generally 1840

An appeal will be dismissed when the decision from which it was taken is not adverse to the appellant's interests.

Lawrence W. Stevens, Riverside Contest No. 06370 (October 31, 1966)

In reply refer to:
704
Riverside Contest
No. 06370

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

October 31, 1966

DECISION

Lawrence W. Stevens :

Blue Sky Annex placer mining claim situated in SE¼ sec. 17, T. 27 S., R. 40 E., M.D.M., California.

Appeal Dismissed

Mr. Lawrence W. Stevens has filed a notice of appeal from the February 4, 1966 decision of the Riverside district and land office which held, inter alia, that a timely answer to the amended complaint in the above-identified contest proceeding had been filed by Mr. Stevens, and others, and that the case would be referred to a hearing examiner for a hearing on the validity of the claim when the decision became final. The decision declared the claim null and void as to the claimed interests of other individuals, and it allowed all parties the right of appeal therefrom within 30 days from notice. No appeals have been received from the others.

The allowance of a right of appeal to Mr. Stevens from the land office decision was an error. The determination that he had timely answered the charges in the complaint and that the case would be set for hearing when the decision became final as to other parties was not an adverse ruling to Mr. Stevens. His interest in the mining claim will be considered in the hearing he requested.

Accordingly, the appeal is dismissed and the record is returned herewith to the district and land office for further appropriate action looking to scheduling of the requested hearing.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

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OPD
Geological Survey, Conservation Division (3)
Gower Federal Service
Appeals List No. 1
AHO

appeal to Sec Affirmed A-30776-10-6-67

DOCKET FILE

Multiple Mineral Development: Act of July 23, 1955 - Surface Uses (Discovery)
3512.1

A mining claimant may be justified in doing further exploratory work in the hope of finding valuable minerals, but exploratory work is not discovery. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. It is only when the exploration work shows that minerals exist in such quantities and such values that there is a reasonable prospect of success in developing a paying mine that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made.

United States of America v. Raymond H. Taylor, Contest No. Sacramento 060098-M (P.L. 167) (December 7, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 JAN 18 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Contest No. Sacramento
060098-M (P.L. 167)

December 7, 1966

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America, Contestant	:	Involving surface rights to the Apex, New Bloomfield, Barbara, Barbara No. 2 and Barbara No. 3 lode mining claims situate in secs. 28, 33 and 34, T. 48 R. 11 W., M.D.M., Siskiyou County, California, within the boundaries of the Rogue River National Forest.
v.	:	
Raymond H. Taylor, Contestee-Appellant.	:	

Decision Affirmed

Mr. Raymond H. Taylor has appealed from the decision dated October 14, 1965, of the Hearing Examiner, declaring the mining claims referred to above to be subject to the limitations and restrictions of Section 4 of the Act of July 23, 1955 (30 U.S.C. § 612).

The Examiner held on the basis of the record assembled at a hearing in the matter on July 20, 1965, that a mineral deposit which can be developed through the expenditure of further labor and means with a reasonable prospect of success was not shown to exist on any of the claims and that therefore there has not been a discovery on any of the claims of a valuable mineral deposit within the meaning of the mining laws (30 U.S.C. § 22 et seq.).

The appellant disputes the correctness of the Hearing Examiner's application of the legal rule of discovery to the testimony and evidence presented at the hearing. He states that the decision of the Examiner is not supported by the hearings record. Further he asserts that "the ore values as presented by the claimant and ignored by the Hearing Examiner do justify a person of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success, in developing these claims" and he contends therefore that the requirements of the statute have been met.

The testimony at the hearing disclosed that a north-south structure or fracture zone runs along the lode line of all of the claims and that the improvements are concentrated within this zone; that the improvements consist of surface cuts in which insignificant minerals have been exposed on all the claims except the New Bloomfield; that on the New Bloomfield there is an adit along the fracture zone with several drifts off the adit, the total underground distance of the adit and drifts being approximately 200 feet; and that there is a fracture zone in the adit from 20 to 50 feet wide.

Without repeating the evidence which has been carefully summarized in the Examiner's decision, it is enough to point out that the contestant's witness, a qualified mining engineer, examined the claims in 1953, in 1957, and again in 1962. On his first examination he took four samples from the New Bloomfield over distances of from three to six feet; the samples included iron pyrite, spots of bornite and some quartz; all of the samples had trace amounts of gold and three samples had trace amounts of silver, the other sample assaying 1.3 ounces of silver per ton. On the later examinations, when the adit on the New Bloomfield had been cleaned and extended, he took 14 additional samples along the adit and at its face, which had negligible values in gold and silver, with values in copper ranging from nothing to one sample of 2.75%. Three other samples taken near the 2.75% sample assayed .10%, none, and .20% copper, respectively. The witness testified that he believed the fracture zone was favorable for the deposition of minerals, and he recommended that it be explored both at depth and along its strike. As noted by the Examiner, the parties appeared to be in agreement that comparable minerals could probably be found in the fracture zone on the other four claims at depth.

The mining claimant presented four rock samples taken from inside the adit on the New Bloomfield. Two of the samples contained nodules of bornite in a matrix of quartz with some visible chalcopyrite, one contained pyrite with disseminated chalcopyrite and four seams of quartz and the fourth sample contained pyrite and quartz but no bornite or chalcopyrite. He presented six assay certificates: one was labelled "Copper Concentrates" and showed 32 % copper, 10 ounces of gold per ton, and trace values in silver; four certificates showed five samples with copper values from .45% to 5.52%; one of the samples showed .012% cobalt. The mining claimant stated he intended to continue the development and exploration work on the claims by extending the drift farther into the mountain and that he believes he can find valuable bornite deposits within the claims.

The Examiner held that the high values shown on the assay certificate for the copper concentrates cannot be considered as representative values of the material in place. He stated that the other samples found by the mining claimant were either selected or had values comparable to those found by the contestant's witness. He noted that these values have been a source of encouragement for the mining claimant and he held that they are sufficient to justify further exploration but are not in themselves indicative of a mineral deposit which can be developed through the expenditure of further labor and means with a reasonable prospect of success, and accordingly that there has not been a discovery on the claims within the purview of the United States mining laws.

The Examiner's appraisal of the evidence is correct. In the absence of evidence by the mining claimant to show the manner of taking the samples and the size of the vein or mineralized material sampled and the quantity of the material sampled, as well as the quantity of such material remaining at the place from which the samples were taken, the assay certificates submitted by him are of limited probative value. Obviously they are not entitled to the same weight as the evidence of the contestant's witness which is supported by his testimony as to the manner of the sampling done and which appears to have been by standard, approved methods. Further, the 2.75% copper sample of the contestant is unsupported either as to value or location by any other sample, hence it would not appear to be representative of the claims. The mere hope or expectation based upon a general belief that values will increase at depth is not sufficient to validate a claim, nor is it sufficient to constitute discovery that the mineral showings indicate only that more exploratory work is warranted.

Under the mining laws "valuable mineral deposits in lands belonging to the United States" shall be open to exploration and purchase and the land in which they are found shall be open to purchase. (30 U.S.C. § 22 (1964)).

In determining whether there has been a discovery of "valuable mineral" within the meaning of the mining laws it has long been recognized that the mere presence of some mineral is not enough. There must be evidence of the existence of mineral in such quality and quantity that a man of ordinary prudence would be justified in expending his time and money with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894); Cameron v. United States, 252 U.S. 450 (1920); Best et al., v. Humboldt Placer Mining Company et al., 371 U.S. 344 (1963).

The mere fact that other mining claims in the vicinity have been or are being operated is not persuasive evidence that a discovery has been made on the claims in issue. If the surrounding claims have been successfully mined, this fact may raise a geological inference that there are valuable mineral deposits to be found in these claims, but such inference may not be substituted for the discovery of a valuable mineral deposit on the claims in issue. United States v. Melvin L. Nevitt, A-30030 (July 28, 1964), and cases cited therein. The willingness of a miner to take the risk involved has never been substituted for justification under the prudent man rule. See Lindley on Mines, 3rd ed., § 336, page 773.

There is a difference between the evidence which will induce a person of ordinary prudence to spend his time and money in an effort to develop a valuable mine and the evidence which will induce him to spend his time and money for the further exploration or prospecting of his mining claim.

In United States v. Clyde R. Altman et al., 68 I.D. 235 (1961), the Department said:

> Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals found are of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made.

Since the evidence sustains the conclusions of the Hearing Examiner that no discovery existed on the claims under the prudent man rule on July 23, 1955, the claims were properly declared to be subject to the limitations and restrictions of section 4 of the act of July 23, 1955, supra.

Accordingly, the decision of the Hearing Examiner is affirmed.

This decision does not preclude the mining claimant from attempting to develop the claims under the mining laws, subject to the limitations and restrictions specified in section 4 of the act of July 23, 1955, supra, which include the right of the United States prior to patent to manage and dispose of the vegetative resources on the lands embraced in the claims and to manage other surface resources thereof.

Mr. Raymond H. Taylor is allowed the right of appeal herefrom to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C., 20240, and the filing fee will be $5 for each mining claim on which favorable action is sought, or $25 if the appeal includes all of the claims adversely affected by this decision. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of proving wherein the decision appealed from is in error.

In the event an appeal is taken the adverse party to be served is:

Regional Attorney
United States Department of Agriculture
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Portland, Oregon 97204

Frances A. Patton

Acting Chief, Office of Appeals and Hearings

Enclosures 2

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OPD
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Administrative Assistant, Hearings
Appeals List No. 1
DEH

DOCKET FILES

Mining Claims: Determination of Validity 3400.1

Placer mining claims are properly declared null and void ab initio when they were located on lands withdrawn from location and entry under the mining laws by an Act of Congress to conserve the water resources and to encourage reforestation of the watersheds of Los Angeles County.

Mining Claims: Withdrawn Land 3400.1; 3400.4

A restoration of lands from a withdrawal will permit location of new mining claims but will not give validity to void claims, which were located while the withdrawal was in effect.

Thomas W. Crane, Riverside 06870-A (December 23, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 JAN 18 AM 10 00 ③

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Riverside 06870-A

December 23, 1966

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Thomas W. Crane, Mining Claimant--Appellant : Frountier, Yuca and Yuca No. 2 placer mining claims (within the Angeles National Forest).

Decision Affirmed

Thomas W. Crane has appealed from a decision by the Riverside, California, District and Land Office, dated August 6, 1965, which declared his Frountier, Yuca and Yuca No. 2 placer mining claims null and void *ab initio* because, as of the dates of location of the claims, the lands were included in a withdrawal from location and entry under the mining laws by the Act of May 29, 1928 (49 Stat. 956), an act to conserve the water resources and to encourage reforestation of the watersheds of Los Angeles County by the withdrawal of certain public lands within the Angeles National Forest. The claims were located on June 9, May 25 and May 27, 1965, respectively.

The record indicates that Mr. Crane had previously filed a petition, dated July 29, 1965, for restoration of the lands to mining location and entry, which petition was before the Forest Service, United States Department of Agriculture, for its consideration in accordance with the said act, *supra*. The petition was apparently filed pursuant to Section 2 of the act which provides "That the President, upon recommendation of the Secretary of the Interior and Secretary of Agriculture, may, by Executive order, when in his judgment the public interest would best be served thereby, and after reasonable notice has been given through the Department of the Interior, restore to location and entry under the mining laws any of the lands withdrawn therefrom."

In substance, the appellant contends: (1) While it is true that the lands were withdrawn by the said act, it is also true that the act has been modified by Public Law 359 - 84th Congress, which permits mining development of all public lands withdrawn or reserved for power development, and (2) A discovery was made and the claims were properly located and the only thing lacking is that the lands upon which the claims are situated have to be restored to mining location, and when this is done the mining claims become valid.

The Act of August 11, 1955 (69 Stat. 681; 30 U.S.C. § 621), commonly referred to as Public Law 359, affects only lands withdrawn for power purposes and has no bearing on lands withdrawn for other purposes. The statutory withdrawal in the instant case was made for the purpose of conserving the water resources and encouraging reforestation of the watersheds of Los Angeles County, and not for power purposes. Even if a power withdrawal were involved in this case, the Department has held that Public Law 359 does not validate any mining claims made subsequent to a withdrawal of the lands and prior to the passage of the act. See Day Mines, Inc., 65 I.D. 145, 148 (1958).

If a restoration of the lands from the withdrawal should be effected as a result of Mr. Crane's petition, it would not validate the claims which he located while the lands were withdrawn. A mining claim made on land withdrawn from mineral entry is void ab initio and will not be validated by any modification of the withdrawal to permit mining locations. See Betty J. Fuller and Luella M. Strother, A-30218 (July 13, 1964) and California Alluvial Mining Corporation, A-29806 (November 13, 1963). A restoration of the lands from the withdrawal will permit location of new mining claims but will not give validity to void claims. California Alluvial Mining Corporation, supra.

For the reasons given, the decision below is correct and is hereby affirmed.

Thomas W. Crane is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all three claims adversely affected by this decision the total filing fee will be $15. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Frances A. Patton

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